Kibosia & 11 others v Chebelieni & another (Civil Appeal E162 of 2021) [2024] KECA 1269 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1269 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL E162 OF 2021

SG KAIRU, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

DR JOHN KIBOSIA ..... 1ST APPELLANT

BENJAMIN KIBOSIA ..... 2ND APPELLANT

PHILIP KIPKEMBOI KIBOSIA ..... 3RD APPELLANT

KIPRONO CHEBOI KIBOSIA ..... 4TH APPELLANT

WYCLIFE KIPRONO LIMO ..... 5TH APPELLANT

KIPTOO CHEBOI KIBOSIA ..... 6TH APPELLANT

CLARA JEMELI KIBOSIA ..... 7TH APPELLANT

PETRONILA KIBOSIA ..... 8TH APPELLANT

NANCY JEPKORIR KURGAT ..... 9TH APPELLANT

JONATHAN KIBOSIA ..... 10TH APPELLANT

EDNA JEPKEMBOI TARUS ..... 11TH APPELLANT

SALLY KIPROP ..... 12TH APPELLANT

AND

MILKA JEBET CHEBELIENI ..... 1ST RESPONDENT

MARGARET JEMUTAI KIBOSIA ..... 2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Eldoret (S.M. Githinji, J) dated 5th July 2021 in Succession Cause No. 129 of 2019)

Failure to assent to a mediation settlement agreement by all parties is a ground for setting aside that agreement

The appeal challenged the ruling by the High Court which dismissed the appellant's application which sought the setting aside of the mediation settlement agreement while allowing the respondents' application which sought for the confirmation of the grant as per the agreement. The court noted that under rule 14 of the Practice Direction on Court Annexed Mediation (Amendment) 2018, no appeal was allowed against an order or judgment of the court arising from mediation. The court found that the Practice Directions did not expressly rule out the conclusion of mediation in one session. The court further held that failure to assent to a mediation settlement agreement was an expression of dissent and disagreement; and thus a ground for setting aside the agreement.

Reported by Kakai Toili

Constitutional Law *– alternative dispute resolution mechanisms – mediation – mediation settlement agreements - setting aside of mediation settlement agreements – where under rule 14 of the Practice Direction on Court Annexed Mediation (Amendment) 2018, no appeal was allowed against an order or judgment of the court arising from mediation – where the Practice Direction on Court Annexed Mediation (Amendment) 2018 did not provide grounds for setting aside an order or decree arising from a mediation settlement agreement could be made - whether failure to sign a mediation settlement agreement was a ground for setting aside the agreement - Practice Direction on Court Annexed Mediation (Amendment) 2018, rule 14.*

Constitutional Law *– alternative dispute resolution mechanisms – mediation – mediator – role of a mediator – whether a mediator could be faulted for conducting and concluding mediation in a single session - what was the role of a mediator where a party became uncooperative and where parties failed to agree - whether a mediator could be faulted for conducting and concluding mediation in a single session.*

Words and *Phrases – mediation – definition of mediation - a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution - Black's Law Dictionary, 10th Edition at page 1130.*

Brief facts

The appellants' application dated March 3, 2020, sought the setting aside of the mediation settlement agreement (the agreement) which had been adopted in respect to the distribution of the estate of the deceased. The application was based on the grounds that mediation was conducted through a single session and some of the beneficiaries did not attend the session, while those present were duped into signing the agreement. The respondents' application dated January 12, 2021, on the other hand sought for the confirmation of the grant as per the agreement and injunctive orders retraining some of the appellants from utilizing certain properties of the estate.

The instant appeal challenged the ruling delivered on July 5, 2021 by the High Court. The impugned ruling dismissed the appellant's application while allowing the respondents' application. The appeal was based on among other grounds, that; the mediator did not involve all beneficiaries in the mediation process; the mediation settlement agreement was adopted without the consent and knowledge of all beneficiaries; and that the mediation settlement agreement did not qualify as a consent judgment.

Issues

i. Whether failure to sign a mediation settlement agreement was a ground for setting aside the agreement.
ii. What was the role of a mediator where a party became uncooperative and where parties failed to agree?
iii. Whether a mediator could be faulted for conducting and concluding mediation in a single session.

Held

1. Being a first appeal, the court's duty as enshrined under rule 31(1)(a) of the Court of Appeal Rules, 2022 was to re-appraise the evidence and draw inferences of fact with a view to arriving at an independent decision.

2. In 2019 when the matter was referred for mediation, the operational guidelines were contained in the Practice Direction on Court Annexed Mediation (Amendment) 2018. The Practice Direction first came into force in 2017 before being amended in 2018. The Practice Direction revoked the Mediation (Pilot Project) Rules, 2015. Although counsel for the parties cited the Mediation (Pilot Project) Rules, 2015 and the Civil Procedure (Court- Annexed Mediation) Rules, 2022 in support of their submissions, those rules had either been repealed or had not been enacted during the period relevant to the appeal.
3. Under rule 14 of the Practice Direction on Court Annexed Mediation (Amendment) 2018, no appeal was allowed against an order or judgment of the court arising from mediation. The agreement was adopted as an order or judgment of the court on February 17, 2020. Pursuant to rule 12(b), any agreement filed with the Deputy Registrar or Magistrate or Kadhi was to be adopted by the court and was to be enforceable as a judgment or order of court. Such a judgment or order was shielded from appeal. Upon adoption the agreement was regarded as a consent judgment.
4. Unlike the Civil Procedure (Court-Annexed Mediation) Rules, 2022, which at rule 39(3) provided the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement could be made, the Practice Direction on Court Annexed Mediation (Amendment) 2018 did not have such a provision. In the circumstances, the court had to fall back on the traditional grounds for setting aside an order or decree entered by consent.
5. The Practice Direction on Court Annexed Mediation (Amendment) 2018 was revoked by the Civil Procedure (Court-Annexed Mediation) Rules, 2022. The entire proceedings in respect of the mediation that had given rise to the appeal were conducted under the Practice Direction on Court Annexed Mediation (Amendment) 2018. Even though not in existence at the time material to the appeal, the provisions of the Civil Procedure (Court-Annexed Mediation) Rules, 2022 adopted the traditional grounds for upsetting a consent judgment or order.
6. The Practice Direction on Court Annexed Mediation (Amendment) 2018 provided the timelines and processes for carrying out mediation. The rules did not expressly rule out the conclusion of mediation in one session. There was no specification on the number of sessions to be held before a mediation settlement agreement could be reached and the mediator in the matter could not be faulted on the ground that he conducted and concluded the mediation in a single session.
7. There was no evidence on record that the appellants were not aware of the date that the mediation was to take place. They could not therefore be heard to say that they were denied an opportunity to attend the mediation. The rules required them to attend the mediation sessions whether by themselves or accompanied by their advocates or representatives. The mediator could not be faulted on the ground that he failed to adhere to the process.
8. The troubling aspect about the agreement was the appellants' complaint that it was not signed by all the parties. The respondents did not dispute that assertion only stating that some of the beneficiaries declined to attend mediation. The deceased died leaving behind 24 beneficiaries. However, from the agreement lodged in court, only 11 of those beneficiaries were present at the initial mediation session and out of those 11 only 10 of them appended their signatures to the agreement.
9. Rule 12(a) of the Practice Direction on Court Annexed Mediation (Amendment), 2018, made it mandatory for the parties to mediation proceedings to sign the mediation settlement agreement. It was by signing the mediation settlement agreement that parties expressed their concurrence to the outcome of the mediation. Failure to assent to a mediation settlement agreement in the circumstances in the instant case was an expression of dissent and disagreement. That failure to sign the mediation settlement agreement may be a good ground for setting aside the agreement.
10. Both the law and good practice required that all the parties to a mediation process must append their signatures to the resulting agreement as an indication of their consensus. That very requirement was lacking in the instant case as only 10 out of the 24 beneficiaries appended their signatures to the

mediation settlement agreement. Much as it was said that some of those absent were represented by the 10th appellant, some of the absent beneficiaries were unrepresented. Court Annexed Mediation was a guided process meant to assist the parties to reach a settlement without requiring the court to solve the dispute.

11. The central place of consensus in mediation may be explained by the fact that the Practice Direction on Court Annexed Mediation (Amendment) 2018 never gave coercive powers to the mediator. Where a party became intransigent by, for example, failing to attend sessions or follow directions, the only recourse open to the mediator was to report such breaches to the court for further action. Where parties failed to agree, the mediator was obligated to report back to the court that no agreement had been reached. Not all cases referred for mediation must result in mediation settlement agreements.
12. The failure by all the beneficiaries or their agents to sign the agreement dated December 19, 2019 meant that there was no proper mediation settlement agreement as envisaged by rule 12(a) of the Practice Direction on Court Annexed Mediation (Amendment) 2018. In the language of the Civil Procedure (Court-Annexed Mediation) Rules, 2022, which came into force after the dispute giving rise to the appeal, the consent judgment was for setting aside on the ground that there was a fundamental mistake by the mediator as related to the mediation proceedings that went to the core of the matter. In the circumstances, there was no proper mediation settlement agreement for the court to adopt as a consent judgment.

Appeal allowed; appellants' application allowed; respondents' application dismissed.

Orders

i. *The application by the appellants dated March 3, 2020 to set aside the order or judgment of the trial court dated February 17, 2020 allowed.*
ii. *The respondents' application dated January 12, 2021 was dismissed.*
iii. *Appeal allowed so that the ruling of the High Court dated July 5, 2021 was set aside in its entirety.*
iv. *The succession cause was remitted to the High Court at Eldoret for hearing and determination on merit by any judge, other than S.M. Githinji, J. The advocates for the parties were directed to place the matter before the Presiding Judge of that court for directions on the hearing of the succession cause on priority basis.*
v. *Each party shall bear their own costs of the appeal.*

Citations

Cases

Kenya

1. *Amcon Builders Ltd v Vintage Investment Ltd & Shankla t/a Shankla & Partners* Civil Suit 255 of 1994; [2018] KEHC 2801 (KLR) - (Explained)
2. *In re Estate of BM (Deceased)* Civil Appeal 2129 & 1975 of 2015; [2019] KEHC 12369 (KLR) - (Explained)
3. *In re Estate of Loise Nduta Muiruri alias Rose Nduta Muiruri (Deceased)* Succession Cause Cause1236 of 2011; [2018] KEHC 9166 (KLR) - (Explained)
4. *Mwangi, Samuel Wambugu v Othaya Boys' High School* Civil Appeal 7 of 2014; [2014] KECA 530 (KLR) - (Explained)
5. *Odera, Abok James t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Explained)
6. *National Bank of Kenya Limited v Ndungu Njau* Civil Appeal 211 of 1996; [1997] KECA 71 (KLR) - (Explained)
7. *Wasike, Flora N v Destimo Wamboko* Civil Appeal 81 of 1984; [1988] eKLR - (Explained)

Regional Court

Brooke Bond Liebig Ltd v Mallya [1975] EA 266 - (Explained)

Texts

1. Garner, BA., Black, HC., (Ed) (2014) *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn pg 1130
2. Weller, S., (Ed) (1992), *Court Enforcement of Mediated Agreements: Should Contract Law be Applied?* Judges Journal Vol 31 pgs 13-14

Statutes

Kenya

1. Civil Procedure (Court- Annexed Mediation) Rules, 2022 (cap 21 Sub Leg) rules 25, 26, 27, 28, 29, 34, 39(3) - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg)) order 45; rule 1(b), 31(1)(a) - (Interpreted
3. Court Annexed Mediation (Amendment) Rules, 2022 (cap 21 Sub Leg) rule 11, 12, 14 - (Interpreted)
4. Laws of Succession Act (cap 160) In general - (Cited)
5. Mediation (Pilot Project) Rules, 2015 (cap 21 Sub Leg) rule 16 - (Interpreted)
6. Probate and Administration Rules (cap 160 Sub Leg) rule 73 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appeal before us is challenging the ruling delivered on July 5, 2021 by SM Githinji, J of the High Court. The impugned ruling dismissed the appellant's application dated March 3, 2020 while allowing the respondents' application dated January 12, 2021. The appellants have raised before us a whopping 30 grounds of appeal which we condense as follows: that the adopted mediation agreement was not valid and was unprocedurally acquired through fraud and misrepresentation; that the mediation settlement agreement offended the provisions of the *Law of Succession Act* and *Practice Direction on Court Annexed Mediation (Amendment) Rules*, 2018; that the mediator did not involve all beneficiaries in the mediation process; that the mediation settlement agreement was adopted without the consent and knowledge of all beneficiaries; and that the learned Judge misapprehended the applicable principles; and that the mediation settlement agreement did not qualify as a consent judgment.

2. To give context to this appeal, in the application dated March 3, 2020, the appellants moved the court seeking to set aside the mediation settlement agreement ("agreement") which had been adopted by the court in respect to the distribution of the estate of Adam Chebelieni Kibosia (Deceased). The application was based on the grounds that mediation was conducted through a single session on December 19, 2019 and some of the beneficiaries did not attend the session, while those present were duped into signing the agreement. The appellants also contended that the mediator did not prepare a mediation report hence the agreement offended rules 11 and 12 of the Practice Direction on Court Annexed Mediation (Amendment) Rules, 2018. The application was supported by an affidavit sworn by the 1st appellant detailing their grievances.

3. The application was opposed through the affidavit of the 1st respondent sworn on May 28, 2020. Her averment was that the application was frivolous, vexatious, a waste of judicial time and without merit. The 1st respondent deposed that the mediation had been initiated by the appellants and the mediator appointed with their consent but some of them had declined to attend the mediation sessions. It was her averment that no objection was ever raised before the court or the mediator against the agreement reached on December 19, 2019. Further, that the agreement was properly endorsed on February 17, 2020. The 1st respondent also averred that no law precluded the parties from engaging in one mediation

session. She therefore asked for the dismissal of the application, asserting that the appellants had not provided sufficient reasons for setting aside the agreement.

4. The other application was that of the respondents dated January 12, 2021 through which they sought for the confirmation of the grant as per the agreement. Also sought were injunctive orders retraining some of the appellants from utilizing certain properties of the estate. In support of the application, the 1st respondent averred that the agreement was in force having been adopted on December 14, 2019. It was her deposition that the respondents needed to use their respective portions of the estate properties while also citing the need to conclude the distribution of the estate. She also averred that the appellants, specifically the 2nd and 10th appellants, had continued to enjoy possession and use of the properties of the estate to the detriment of the respondents.

5. The application was opposed through a replying affidavit sworn on January 29, 2021 by the 1st appellant. It was his averment that the application was frivolous, *res judicata* and *sub judice*. He deposed that the application was untenable and brought in bad faith considering that the respondents were seeking to restrain the appellants from accessing the homes they had constructed on the estate properties. The 1st appellant also deposed that an order of injunction could not issue because the agreement was being contested and the succession process was thus incomplete.

6. Both applications were canvassed by way of written submissions. In his ruling, the learned Judge dismissed the appellants' application holding that the agreement was valid and no grounds had been provided to warrant the setting aside of the consent judgment entered pursuant to the agreement. The learned Judge proceeded to allow the respondents' application noting that the agreement between the parties was binding. It is those orders that the appellants seek to upset through this appeal.

7. This appeal was placed before us for hearing through the court's virtual platform on April 23, 2024. Learned counsel Mr Nabasenge appeared for the appellants while learned counsel Ms Ledishah and learned counsel Mr Oduor appeared for the 1st respondent and 2nd respondent respectively. Counsel had filed written submissions which they sought to rely upon accompanied by oral highlights.

8. Through the submissions dated March 4, 2024, Mr Nabasenge argued that the agreement was irregular, null and void. According to counsel, the process leading to the agreement was marred by various irregularities. Counsel submitted that among the irregularities was the fact that the mediation was conducted in one session and impetuously contrary to rules 11 and 12 of the Practice Direction on Court Annexed Mediation (Amendment) Rules, 2018. Counsel urged that ordinarily, the mediation process should go through three stages to allow parties to appreciate the process and come out with a satisfactory and mutual agreement. Another irregularity pointed out by counsel is that the agreement presented to the trial court did not conform to forms 7 and 8 of the Practice Direction on Court Annexed Mediation (Amendment) Rules, 2018, which required the agreement to be signed by the parties and their advocates. It was counsel's assertion that contrary to the said requirement, the agreement was signed by 11 of the 26 beneficiaries. Concluding on this issue, counsel submitted that the parties did not understand the agreement, which was, in any case,inconclusive as regards the distribution of the estate of the deceased. Counsel relied on In *Re Estate of BM (Deceased)* [2019] eKLR in support of the proposition that failure by all parties to append their signatures to the agreement meant that there was no valid mediation settlement agreement.

9. Mr Nabasenge additionally submitted that the learned Judge had power under rule 73 of the *Probate and Administration Rules* and order 45 rule 1(b) of the *Civil Procedure Rules* to set aside the agreement and that the appellants had provided sufficient reasons for doing so. Counsel referred to the case of *National Bank of Kenya Ltd v Ndungu Njau* (Civil Appeal No 211 of 1996, as cited in the High Court case of *Re Estate of Loise Nduta Muiruri* (Deceased) [2018] eKLR, to urge that the court is always at

liberty to reopen and set aside a mediation settlement agreement where there is no unanimity. Counsel urged that since the agreement was endorsed in the absence of some of the parties, it was marred by an error which can only be corrected by setting it aside. In conclusion, counsel urged us to set aside the agreement and order the succession cause to proceed for hearing and determination in the High Court.

10. In opposing the appeal, Ms Ledishah through submissions dated April 17, 2024 argued that the mediation process was legal and procedural, and that the subsequent complaint over the process by the appellants was an afterthought. Counsel asserted that rules 25, 26, 27, 28 and 29 of the *Civil Procedure (Court- Annexed Mediation) Rules*, 2022 clearly identifies the roles of the mediator, the parties and their legal representatives during mediation. Counsel rejected the appellants' argument that mediation proceedings cannot be concluded in one sitting, asserting that nothing barred the mediator from finalizing mediation in one session. According to counsel, mediation proceedings are time- bound and should be concluded within sixty days from the date a mediator is notified of his or her appointment.

11. Counsel also submitted that there is no provision or requirement for a mediation report to be served upon the parties and that instead, what is required is for the report to be filed in court and therefore the agreement is valid. She stressed that the agreement was properly adopted by the court on February 17, 2020 as provided for under rule 34. According to counsel, the appellants' assertion that the agreement was adopted without their knowledge was not a ground for setting aside a consent judgment. Finally, Ms. Ledishah submitted that the appeal lacks merit as there is no right of appeal against a judgment entered pursuant to a mediation settlement agreement. Counsel referred to rule 16 of the *Mediation (Pilot Project) Rules*, 2015 and rule 39 of the *Civil Procedure (Court-Annexed Mediation) Rules*, 2022 to buttress this argument. She urged us to dismiss the appeal in its entirety and award costs to her client.

12. Mr Oduor for the 2nd respondent commenced his submissions by indicating that his client was associating herself with the submissions of the 1st respondent. Turning to the 2nd respondent's submissions dated April 17, 2024, counsel submitted that the appellants have not established sufficient reasons to warrant the setting aside of the consent judgment. Counsel referred to the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266, as cited in *Flora N Wasike v Destimo Wamboko* [1988] eKLR, to urge that a court cannot interfere with a consent judgment for no good reason. Counsel reiterated the facts of the case and urged that that the grounds adduced by the appellants for settling aside the consent judgment were inadequate. He submitted that the agreement was arrived at after all the parties were accorded an opportunity to be heard and due process adhered to. In the end, counsel asserted that this appeal is an abuse of the court process and should be dismissed with costs to the respondents.

13. This being a first appeal, our duty as enshrined under rule 31(1)(a) of the Court of Appeal Rules, 2022 is to re-appraise the evidence and draw inferences of fact with a view to arriving at our independent decision. This duty has been stated in several decisions of this court, including *Abok James Odera T/A AJ Odera & Associates v. John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, where it was held that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

14. We have gone through the memorandum of appeal, the record of appeal, the submissions and the authorities cited therein. In our view, this appeal will be determined by answering the question as to whether there was a valid mediation settlement agreement before the High Court.

15. The letter dated May 30, 2018 authored by the Chief of Moiben Location indicated that the deceased was survived by 24 beneficiaries. By the consent of the parties, the dispute in respect to the distribution of the estate of the deceased was referred to Mr Bungei Jonathan Kipkorir for mediation. In the agreement dated December 19, 2019, 10 out of the 11 members who were present during mediation appended their signatures to the document. It was this agreement that was presented to the Deputy Registrar on February 3, 2020 who placed it before the Judge. On February 17, 2020 when the matter came up for mention, the Deputy Registrar indicated that the agreement had been endorsed. It is this agreement as adopted that is at the centre of this appeal. The date of the adoption of the agreement is not clear from the record and we will go by February 17, 2020 as the date of the adoption of the agreement.

16. In 2019 when this matter was referred for mediation, the operational guidelines were contained in the Practice Direction on Court Annexed Mediation (Amendment) 2018. The Practice Direction first came into force in 2017 before being amended in 2018. The Practice Direction revoked the *Mediation (Pilot Project) Rules*, 2015. Although counsel for the parties cited the *Mediation (Pilot Project) Rules*, 2015 and the *Civil Procedure (Court- Annexed Mediation) Rules*, 2022 in support of their submissions, those rules had either been repealed or had not been enacted during the period relevant to this appeal.

17. Under rule 14 of the Practice Direction on Court Annexed Mediation (Amendment) 2018, no appeal was allowed against an order or judgment of the court arising from mediation. As we have already stated, the agreement was adopted as an order or judgment of the court on February 17, 2020. Pursuant to rule 12(b), any agreement filed with the Deputy Registrar or Magistrate or Kadhi was to be adopted by the court and was to be enforceable as a judgment or order of court. Such a judgment or order was shielded from appeal. There is no doubt, and both sides of the divide in this appeal accede to this position of the law, that upon adoption the agreement was regarded as a consent judgment.

18. Unlike the *Civil Procedure (Court-Annexed Mediation) Rules*, 2022, which at rule 39(3) provides the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement can be made, the Practice Direction on Court Annexed Mediation (Amendment) 2018 did not have such a provision. In the circumstances we will have to fall back on the traditional grounds for setting aside an order or decree entered by consent. For purposes of record, the Practice Direction on Court Annexed Mediation (Amendment) 2018 was revoked by the *Civil Procedure (Court-Annexed Mediation) Rules*, 2022. It is important to observe that the entire proceedings in respect of the mediation that has given rise to this appeal were conducted under the Practice Direction on Court Annexed Mediation (Amendment) 2018.

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 side 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."

22. Turning to the appeal before us, we observe that the parties disagree on two main issues regarding the agreement dated December 19, 2019. The first relates to the process while the second refers to the end product, the agreement itself. With regard to the process, the appellants contend that they were denied an opportunity to be heard and that there was no mediation at all as only one session was held as opposed to three sessions. As for the agreement, they argue that it was incomplete as some of them did not assent to it by signing it. In response the respondents contend that the process was legal and that the appellants were accorded a chance to be heard but some failed to attend the proceedings while others, though absent, were represented by the 10th appellant.

23. The Practice Direction on Court Annexed Mediation (Amendment) 2018 provided the timelines and processes for carrying out mediation. The rules did not expressly rule out the conclusion of mediation in one session. There was no specification on the number of sessions to be held before a mediation settlement agreement could be reached and the mediator in this matter cannot be faulted on the

ground that he conducted and concluded the mediation in a single session. Still on the procedural aspect, there is no evidence on record that the appellants were not aware of the date that the mediation was to take place. They cannot therefore be heard to say that they were denied an opportunity to attend the mediation. The rules required them to attend the mediation sessions whether by themselves or accompanied by their advocates or representatives. Again, the mediator cannot be faulted on the ground that he failed to adhere to the process. The appeal cannot therefore succeed on this particular ground.

24. We think the troubling aspect about the agreement is the appellants' complaint that it was not signed by all the parties. The respondents did not dispute this assertion only stating that some of the beneficiaries declined to attend mediation. It is not disputed that the deceased died leaving behind 24 beneficiaries. However, from the agreement lodged in court, only 11 of those beneficiaries were present at the initial mediation session and out of those 11 only 10 of them appended their signatures to the agreement. Rule 12(a) of the Practice Direction on Court Annexed Mediation (Amendment) 2018 provided that:

> "
>
> (a) Where there is an agreement resolving some or all of the issues in dispute, such agreement shall be in the prescribed Form 8, duly signed by the parties and shall be filed by any of the parties, with the Deputy Registrar or Magistrate or Kadhi as the case may be within ten (10) days of conclusion of the mediation."
>
> (Emphasis ours).

25. The foregoing provision made it mandatory for the parties to mediation proceedings to sign the mediation settlement agreement. It is our view that it is by signing the mediation settlement agreement that parties express their concurrence to the outcome of the mediation. Failure to assent to a mediation settlement agreement in the circumstances in this case is an expression of dissent and disagreement. That failure to sign the mediation settlement agreement may be a good ground for setting aside the agreement was highlighted by Steve Weller in his article titled *Court Enforcement of Mediated Agreements: Should Contract Law be Applied?* [1992], Judges Journal Vol 31 at pages 13-14 where he opined that:

> "Lack of mutual assent is a more likely ground for attacking a settlement agreement. It is in essence a claim that no agreement was in fact reached. When such a claim is made, it is possible that a reviewing court may decide to hold an evidentiary hearing on that claim prior to enforcing the agreement. The claim may be based on the presence or absence of language in the agreement itself or may be based on extrinsic evidence of the intent of the parties, and it may relate to the entire agreement or to a part of the agreement."
>
> (Emphasis ours)

26. We also wish to quote with approval the views of PJO Otieno J in *Amcon Builders Ltd v Vintage Investment Ltd & another* [2018] eKLR that:

> "Unlike arbitration or litigation mediation process ends with an agreement not an award. The success of a mediation process is that parties come up with own resolution. The part of the mediator is merely to guide the parties by setting an atmosphere of mutual, candid and honest discussions. He makes no own findings nor does he make any coercive determination at all. His is to listen and assist the parties settle. Once a settlement is reached, he may assist in drawing and crafting the agreement which is then owned by the parties by each appending his signature thereto. Even where parties agree on the dispute but decline to sign

the agreement, the mediator must report lack of agreement. Indeed parties can reach a partial agreement which if signed is reported by the mediator as such. A mediator merely helps parties reach a mutually agreeable solution."

(Emphasis ours).

27. The Judiciary Mediation Manual issued on May 8, 2017 by David K Maraga, the former Chief Justice also provides at Part 4.2(c) that:

> " All parties shall sign the Mediation Settlement Agreement upon confirmation of terms."

28. It follows that both the law and good practice require that all the parties to a mediation process must append their signatures to the resulting agreement as an indication of their consensus. This very requirement was lacking in this case as only 10 out of the 24 beneficiaries appended their signatures to the mediation settlement agreement. Much as it was said that some of those absent were represented by the 10th appellant, it was not disputed that some of the absent beneficiaries were unrepresented. Court Annexed Mediation, we must point out, is a guided process meant to assist the parties to reach a settlement without requiring the court to solve the dispute. Thus, one of the definitions of mediation found at page 1130 of the 10th Edition of *Black's Law Dictionary* is:

> " A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."

29. The central place of consensus in mediation may be explained by the fact that the Practice Direction on Court Annexed Mediation (Amendment) 2018 never gave coercive powers to the mediator. Where a party became intransigent by, for example, failing to attend sessions or follow directions, the only recourse open to the mediator was to report such breaches to the court for further action. Where parties fail to agree, the mediator is obligated to report back to the court that no agreement has been reached. Not all cases referred for mediation must result in mediation settlement agreements. In the circumstances of this case we are convinced that the failure by all the beneficiaries or their agents to sign the agreement dated December 19, 2019 meant that there was no proper mediation settlement agreement as envisaged by rule 12(a) of the Practice Direction on Court Annexed Mediation (Amendment) 2018. In the language of the *Civil Procedure (Court-Annexed Mediation) Rules*, 2022, which we appreciate came into force after the dispute giving rise to this appeal, the consent judgment was for setting aside on the ground that there was "a fundamental mistake by the mediator as relates to the mediation proceedings that goes to the core of the matter." In the circumstances of this appeal, we find that there was no proper mediation settlement agreement for the court to adopt as a consent judgment.

30. Finally, on the issue of costs we note that the parties before us are family members and the dispute revolving around succession of the estate of their patriarch remains undetermined. In the circumstances, there is good reason for departing from the rule that costs follow the event. The proper order is to direct the parties to meet their own costs of the appeal, which we hereby do.

31. Consequently, we find that the application by the appellants dated March 3, 2020 to set aside the order or judgment of the trial court dated February 17, 2020 was merited and was for allowing. It follows that the respondents' application dated January 12, 2021 was without merit and was for dismissal. Consequently, the appeal succeeds so that the ruling of the High Court dated July 5, 2021 is set aside in its entirety. The succession cause is remitted to the High Court at Eldoret for hearing and determination on merit by any judge, other than SM Githinji, J. The advocates for the parties are

directed to place the matter before the Presiding Judge of that court for directions on the hearing of the succession cause on priority basis.

32. Each party shall bear their own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR