



REPUBLIC OF KENYA



**In re Estate of Joseph Njeri Ndungu alias Josephine Njeri (Deceased) (Succession Cause E034 of 2021) [2025] KEHC 9292 (KLR) (Family) (27 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE E034 OF 2021**

**PM NYAUNDI, J**

**JUNE 27, 2025**

**IN THE MATTER OF THE ESTATE OF JOSEPHINE NJERI NDUNGU  
ALIAS JOSEPHINE NJERI(DECEASED)**

**BETWEEN**

**DANSON MWARIRI NDUNGU ..... APPLICANT**

**AND**

**RUTH KAHAKI NDUNGU ..... RESPONDENT**

**RULING**

1. The Application for determination is dated 26<sup>th</sup> June 2023 filed by Danson Mwariri Ndungu (the applicant). It seeks the following orders;
  1. The orders made on 26<sup>th</sup> April 2023 adopting the Mediator's Report /settlement agreement be set aside.
  2. The mediator's report/settlement agreement dated 11<sup>th</sup> April 2023 and filed in court be set aside and be struck off the record.
  3. This matter do proceed in court for hearing and determination.
2. The Application is brought pursuant to Rule 49,59 and 73 of the Probate and Administration Rules and was supported by the sworn affidavit of the applicant of even date.
3. Ruth Kahaki Ndungu opposed the application vide a replying affidavit dated 11<sup>th</sup> July 2023.



### **Applicant's Case.**

4. The applicant averred that when this matter was referred to mediation, he agreed to surrender land known as LR 13330/366 to Ruth Kahaki Ndungu in exchange of Thika Municipality (Kiganjo Ranching) Block 30/3116. Ruth indicated to the mediator that the land was available for transfer. However, when he asked her to surrender the title to him, she informed him that she had sub-divided the title into two and transferred it to her children. He visited the property himself and that was the true position. He argues that the mediation agreement was obtained by fraudulent misrepresentation as the said land was unavailable. He called the mediator and informed him of the turnout of events vide a letter dated 12<sup>th</sup> April 2023. The mediator however noted the complaint and indicated that the issue would be resolved on 17<sup>th</sup> April 2023 when the matter would be mentioned.

### **Respondent's Case.**

5. She averred that during the mediation settlement, she agreed to exchange land with the applicant. That she disclosed the status of the land and all parties were aware that her children reside on the suit land. She argued that she and her children are agreeable to moving out of the land once the Applicant surrenders his title. The land is still available for transfer. She argues that upon confirmation of grant, she will surrender the title and have her children relocate to a different land. She argued that the Applicant's application is premature as no titles have been exchanged. She argued that the mediation agreement was entered into voluntarily; no party was coerced into signing it.
6. The summons was disposed of by way of written submissions. It is only the applicant who filed written submissions.

### **Applicant's Submissions.**

7. The applicant submitted that the Respondent did not disclose to the mediator that she had sub divided the land and that her children were staying on the property. That such information is important and needed to be captured in the mediation agreement in the event that the Respondent's children refuse to transfer the land to him. According to him, there was non- material disclosure and therefore, the consent should be set aside.

### **Analysis And Determination**

8. I have considered the foregoing averments as well as the submissions filed by the applicant. I find the only issue for determination in this application as whether there exist enough grounds to set aside the mediation settlement agreement of 11<sup>th</sup> April 2023.
9. The guiding principles used by courts in setting aside consent judgments or orders are well established. In *Flora N. Wasike v Destimo Wamboko* [1988] eKLR Hancox, JA, as he then was, said: -  
  
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 certain conditions remained to be fulfilled which are not carried out
10. This position is clearly articulated in the English Case of *Purcel v F. C. Trigell Ltd, (trading As Southern Window And General Cleaning Co. and Another)*, [1970] 3 ALL ER671, where Winn, LJ, opined:  
  
It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally



competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.

11. In *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485, it was held that an order entered into by consent 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, or in representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

The marking by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.

12. The consent herein was entered into on 11<sup>th</sup> April 2023 and was adopted as an order of the court on 26<sup>th</sup> April 2023. The mediation settlement agreement was arrived at after the main suit was referred to mediation.

13. Rule 39 of the Mediation Rules on Setting aside an order or decree arising out of a settlement agreement stipulates that:

9.(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.

14. In the instant case, there is no evidence that the applicant herein first sought leave of court to apply for the setting aside of the Mediation Settlement Agreement or that he was granted such leave by this court. He simply filed an application for setting aside of the Mediation Settlement Agreement without first seeking and obtaining leave to apply.

15. Without complying with the provisions of Section 39 (9) (1) and (2) of the Mediation Rules as above stated, this court lacks jurisdiction to entertain an application brought seeking to set aside the Mediation Settlement Agreement as is in the instant case.

16. The Mediation Settlement Agreement created a binding contractual arrangement and relationship amongst the parties thereto. More so, under Section 59B (4) and (5) of the *Civil Procedure Act*:

(4)An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court.(5)No appeal shall lie against an agreement referred to in subsection (4).

17. In addition, the judgment founded on Mediation cannot be set aside. Neither can it be appealed against. The intention was to give finality to the Mediation process. The consent entered into herein created a contractual relationship between the parties who are bound by it.

18. In *Kenya Commercial Finance Company Ltd v Ngeny & Another* [2002] 1 KLR, it was stated that:

The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions.



19. Having carefully perused the application, I do not find any evidence of coercion, fraud, mistake or misrepresentation as a ground to have been advanced and proved by the applicant herein to warrant the interference with the order given by the court adopting the Mediation Settlement Agreement as the order of the court.
20. There was no proof of undue influence, coercion or intimidation of the parties in arriving at the Mediation Settlement Agreement. The Agreement is not ambiguous. The parties finally agreed on how to settle the dispute that confronted them, and had the advice of the counsel during the exercise. The Mediation Settlement Agreement created a binding contractual arrangement and relationship amongst the parties. The Respondent has sworn an affidavit that the Title of the subject parcel will revert to the Applicant, his misgivings are therefore unfounded at this stage
21. The Applicant has not proved the existence of any of the ingredients which would merit the setting aside of the mediation settlement agreement dated April 11, 2023. Reasons wherefore, it is my finding that the application dated June 26, 2023 is devoid of any merit and is consequently dismissed with an order that each party bear their own costs of the application.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 27<sup>TH</sup> DAY OF JUNE, 2025.**

**P. M NYAUNDI**

**JUDGE**

In the presence of:

Kimani for Administrators

Fardosa Court Assistant.

