



**In re Estate of Malome Origa (Deceased) (Succession Cause 777 of 2012)
[2023] KEHC 22663 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 777 OF 2012
RE ABURILI, J
SEPTEMBER 29, 2023**

BETWEEN

MARTIN ODARO MALOME PETITIONER

AND

MAURICE OTIENO MALOME APPLICANT

AND

JOSEPH CHORE MALOME 1ST RESPONDENT

SIMON PETER MALOME ALIAS SIMEON PETE MALOME 2ND RESPONDENT

JUDGMENT

1. This Succession Cause file was closed on December 21, 2021 by F. A. Ochieng J following the adoption of the Mediation Settlement Agreement dated December 7, 2021 as Judgment of the court. It is worth noting that parties too consented on October 18, 2021 to resort to mediation to settle the issues that were outstanding which had returned them to this court after the grant of letters of administration intestate in respect of the estate of Malome Origa was confirmed.
2. There are two applications for determination although the prayers are basically the same in nature hence the directions given by this court on May 15, 2023 that the two applications dated April 11, 2022 and June 21, 2022 respectively be heard simultaneously by way of written submissions.
3. As earlier stated, the medication agreement settled the summons for revocation of grant dated 16th December 2020 filed by Martin Odaro Malome. The Administrators/Petitioners in this cause are Martin Odaro Malome and Joseph Chore Malome.
4. In the Notice of Motion dated 11th April 2022, the Applicant is Maurice Otieno Malome. He prays that the order dated 21st December 2021 closing the file be reviewed as the parties by consensus agreed to rectify the negotiated mediation agreement of 7th December 2021. He further prays that the said



mediation agreement dated 7th December 2021 be amended and be rectified and or reviewed to increase the share of the Maurice Otieno Malome in Land parcel No. Kisumu/Kichieng/1468 from 1.5 acres to 2.5 acres per the mediation agreement dated 28th January 2022 and that this was raised by the applicant at the time the agreement was finalised on the ground.

5. The other orders sought by the Applicant are that the land was originally purchased by Maurice and was registered in his father's name; that there is total consensus on the addition of 1 acre to Maurice's share to make it 2¹/₂ acres and the court's direction is sought to enable the documentation for posterity and future succession; that all further orders and inquiries be made as the nature of the case may require and court deem it fit to grant.
6. In the supporting affidavit sworn by the applicant, he gives the history of the matter and concedes that the parties consented to mediation and that after the mediation agreement, on the 28th January 2022, the brothers had a change of mind and filed further consensus agreement reached by Maurice, Martin and Joseph that Maurice be added a further one and a half acres since he was the original purchaser of the land which was then (sic) and that the brothers were told that the mediation agreement cannot be reviewed and or applied for and or amended hence, the need to return to court so that the additional one acre and a half acre share be recorded in the consensus for posterity (sic).
7. In the application dated 21st June 2022, the Applicant is Martin Odaro Malome who seeks orders that clauses 1 and 2 of the Mediation Settlement Agreement dated 7th December in Ksm/Med/HC/Succ/123/2021 arising from the subject Succession cause be adopted as the order of this court.
8. The Applicant also prays that clauses 3 and 4 of the Mediation Settlement Agreement dated 7th December 2021 in KSM/MED/HC/SUCC/123/2021 arising from the subject succession cause be set aside. He further prays that upon prayer 2 being granted, the Objector/Applicant's summons for revocation of grant dated 23rd December 2020 be fixed for hearing viva voce in respect of the mode of distribution of the estate of the deceased. He also prays for grant of such other or further orders as the court deems just and fit.
9. The grounds upon which the application is predicated are that; the mode of distribution under clause 3 of the said Mediation Settlement Agreement is contrary to the Policy of this court and law in relation to distribution of the estate of a deceased person who was polygamous; that the said mode does not reflect the agreement at family level between the Objector and Respondents herein; that the deceased's 2nd home represented by the Respondents, received over 50% of the estate of the deceased; that the said mode of distribution under clause 3 greatly prejudices the deceased's 1st house, represented by the Objector/Applicant herein; that the Respondents took advantage of the advanced age of the Objector/Applicant to arrive at a mode of distribution of the estate of the deceased favourable to the Respondents; that the said Mediation Settlement Agreement was signed by the Objector/Applicant without the counsel, and absence of his advocates; that the Respondents shall not suffer serious, if any, prejudice if the application is allowed and finally, that the interests of substantive justice favour the application.
10. The application was supported by an affidavit sworn by Martin Odaro Malome on 21st June 2022 reiterating the grounds in support as reproduced above and explaining the process that mediation took, adding that the parties reached their own agreement at family level as the sons of the deceased, whereby they agreed to share each of the seven parcels of land Kisumu/Kochien/1174, 1177, 1255, 1468, 1867, 2058 and 2187 equally among the two houses of the deceased.
11. That when the said parties met the mediator and notified him of the contents of their agreement, he prepared and parties signed it. That the applicant is 89 years with poor eye sight so he signed the said



agreement without reading it, genuinely believing that it reflected the said agreement at family level but that upon his return at home, his son Samson Odaro read and told him that the typed mediation Agreement did not reflect the family agreement which was shocking as the 2nd house had received over 50% of the share of the estate hence his objection to clauses 3 and 4 of the said Agreement on the mode of distribution of the estate and confirmation of the grant. He deposes that as the two clauses of the Mediation Settlement Agreement do not reflect the agreement between the parties hereto, it should be set aside.

12. Opposing the two applications, the Respondents on their behalf, Joseph Chore Malome swore a replying affidavit on 14th October 2022 deposing that the agreement on the mode of distribution of the deceased's estate was reached amicably and by consensus after the parties requested to return as a different date to sign and obtain typed copy of what had been agreed.
13. That the mediator read the document in the presence of Martin's advocate and the contents were acceptable to all of them after which they all signed and were given copies thereof. That both applicants know how to read and especially Martin Odaro Malome who worked for many years as a field supervisor at Muhoroni Sugar Company Limited hence he cannot claim to be illiterate.
14. It is further deposed that after the Mediation Settlement Agreement, and the signing thereof, all parties shook hands before going home.
15. According to the deponent Respondent, Maurice Otieno Malome has not raised any complaints about the mode of distribution of the deceased's estate as contained in the Mediation Settlement Agreement. That in his view, the problem is with Martin's wife and children who have caused him to change his mind several times in the past even after they have agreed on the mode of distribution of the estate.
16. That clauses 3 and 4 of the Mediation Settlement Agreement contain the main agreement between the parties herein hence setting aside those clauses shall amount to setting aside of the entire mediation proceedings. Further that the applicant has not demonstrated that the Mediation Settlement Agreement clauses 3 and 4 were not the result of the Mediation proceedings or that the mediator is guilty of any form of misconduct.
17. He urged that the Mediation Settlement Agreement ought to be adopted in full as the judgment of the court and a final decree issued so that the dispute between the parties be finally settled.
18. Martin Odaro Malome swore and filed a further affidavit denying all the depositions in the affidavit sworn by Joseph Chore Malome on 14th October 2022 maintaining that clauses 3 and 4 of the Mediation Settlement Agreement dated 7th December 2021 should be set aside as they do not reflect the general agreement at the family level as communicated to the mediator on 1st December 2021 by the parties hereto.
19. Maurice Otieno Malome too swore a further affidavit on 16th January 2023 filed in court on 17th January 2023 reiterating his prayers and deposition in his supporting affidavit urging this court to amend/rectify and or review the Mediation Settlement Agreement dated 7th December 2021 to increase his share in Land Parcel No. Kisumu/Kochieng/1468 from 1^{1/2} to 2^{1/2} acres as per the Mediation Agreement of 28th January 2022 since the land was originally purchased by him and registered in his father's name.
20. He deposed that the cited land is to be shared among Martin Odaro Malome, Maurice Otieno Malome and Gordon Ochieng Malome (Deceased).



21. Further that L.R Kisumu/Kochieng 1867 (0.1) Ha is to be divided between him and Griphine Wesley Odhiambo as a beneficiary for Simon Pete Malome as the land was bought by the deponent who decided to share with his late brother Simon Pete Malome.
22. He further supported the deposition by Martin Odaro Malome on the alleged agreement to share Land Parcels Kisumu/Kochieng/1074, 1177, 1255, 1468, 1867, 2058 and 2187 equally among the 2 houses and stated that the advocate who was holding brief for Mr. Odingo Advocate signed without first reading the Mediation Settlement Agreement.
23. That he objects to clauses D and G of the Mediation Settlement Agreement on the mode of distribution of parcels Kisumu/Kochieng East 1867 and 1468 as the 2 clauses do not genuinely capture the original agreement that was done at home between the parties herein.
24. Joseph Chore Malome then filed a further Replying affidavit (should be supplementary affidavit) sworn on 21st February 2023. On the proposal to increase the share of Maurice Otieno Malome from 1^{1/2} to 2^{1/2} acres, it was deposed that the subject parcel of land is only 6 acres and that each house was given 3 acres meaning in the first house, the 2 applicants have 1^{1/2} acres each whereas in the 2nd house which has Joseph Simon Pete and late Gordon Ochieng are getting only 1 acre each.
25. The Respondent denied that the parcel of land Kisumu/Kochieng East/1468 was purchased by the Applicant Maurice Otieno Malome. That there was no consensus agreement, apart from Mediation Settlement Agreement, to add Maurice Otieno one more acre of the above parcel.
26. The deponent further denied that Maurice Otieno purchased Land Parcel No. Kisumu/Kochieng East/1867 and that all land purchased by the deceased's children were in their respective names.
27. That the allegations disowning the Mediation Settlement Agreement are an afterthought and calculated to defraud the other beneficiaries as the affidavit of Martin Odaro acknowledges that the parcels 1468 and 1867 are part of the deceased's estate.
28. That the Mediation Agreement was read to all parties and they all signed in the presence of the applicants' advocate hence the Mediation Settlement Agreement (MSA) should be fully adopted in full as the judgment of the court and decree issued.

Submissions

29. Each of the applicants and the Respondent filed their respective written submissions in support of their respective positions while reiterating the depositions and grounds in support of their cases.
30. The 1st objector reproduced in his submissions what he had prayed for in his application while the 2nd objector relied on rule 34(3) of the Mediation Rules that provide that if the court deems it necessary, it may seek clarification from the mediator before adopting the Mediation Settlement hence the Court does not automatically have to adopt the MSA. he also cited Rule 39(3) of the Mediation Rules on the conditions that must be fulfilled for a MSA to be set aside and urged this court to invoke its discretion and set aside the MSA because the family had agreed to redistribute the land. The rest of the submissions reproduce what is in the depositions and which I have reproduced in this judgment.
31. The Respondent in his submissions argued that the two applications are vexatious as the history of this matter demonstrates hence they ought to be dismissed with costs. He then gave a brief history of the matter and the events leading to the referral of the dispute to mediation by consent and after withdrawing from court the application dated 11th March, 2019 with full participation of all the



parties who also allowed the surveyor to subdivide Land Parcel no Kisumu/Kochieng/1468 so as to fully share it in accordance with the Certificate of Confirmation of Grant.

32. That the 1st objector then turned around and filed another application dated 23rd December 2020 seeking to revoke the Certificate of Confirmation of Grant dated 14th May 2014 and that it is that application which led to the referral of the dispute for mediation, a process which he fully participated in and signed the MSA. It was argued that the case for setting aside the MSA had not been made. Reliance was placed on [*In Re estate of Lenard Walter Oselu Nyalik \(Deceased\)*](#) [2022] eKLR

Determination

33. I have considered the two applications filed by the Objectors/Applicants separately, the grounds and affidavits in support and further affidavits as well as the replying affidavits and written submissions and authorities relied upon by both parties' counsel.
34. The main issue for determination is whether the applications are merited, seeking that this court do set aside the Mediation Settlement Agreement dated 7th December 2021 adopted on 21st December 2021 by F. A. Ochieng J following a consensus referral of the matter for mediation on 18th October 2021 and the signing of the filed MSA.
35. A Mediation Settlement Agreement is an important piece of contract that helps in dispute resolution. It is a document which is created after a successful voluntary or court mandated mediation process.
36. The mediation Settlement is a binding contract or consent outlining the terms and condition of the dispute resolution reached between or among the parties to the dispute. The Mediation Settlement Agreement is an important tool that provides evidence of the parties' agreement and is enforceable in a court of law since it serves as proof of the resolution of the dispute and outlines the obligations of each party to the dispute and to the Mediation Settlement Agreement.
37. In the instant case, on 18th October 2021, the disputants in this succession cause agreed by consent to refer the dispute to Court Annexed Mediation. The matter was then placed before the Mediation Deputy Registrar who appointed a mediator for the parties and on 7th December 2021, the Mediator filed into court the Mediation Settlement Agreement dated 7th December 2021.
38. The mediator was Patrick Lumumba Otieno; an accredited mediator. All the parties to the dispute namely, Martin Odaro Malome; Joseph Chore Malome; Gordon Ochieng Malome; Maurice Otieno Malome and Simon Pete Malome signed the Mediation Settlement Agreement which was also signed and dated by the mediator and the advocate holding brief for the Objector's counsel Mr. J. O. Odingo. The Petitioners'/Respondents' counsel was not present and did not sign the Mediation Settlement Agreement.
39. The Mediation Settlement Agreement sets out the terms of the agreement; annuls the certificate of confirmation of grant issued on 19th May 2014 and any subsequent actions pursuant to the confirmation of grant, and distributes the estate of the deceased in the manner set out in the table/Schedule and proceeds to allow by consent, the confirmation of the grant issued to the joint administrators Martin Odaro Malome and Joseph Chore Malome on 19th March 2013. Each party were to bear their own costs.
40. The Mediation Settlement Agreement having been filed and adopted by the judge as Judgment of the court confirming the grant; and therefore effectively distributing the estate of the deceased amongst his eligible beneficiaries, it is binding on all parties privy to it and it can only be set aside if the condition for



setting aside of consents or contracts are fulfilled. In addition, under the Court Annexed Mediation Rules, 2022, Rule 34-

- (1) mandates the Mediation Deputy Registrar or other officer designated for that purpose to within ten (10) days after settlement agreement being filed under Rule 32, place the Settlement Agreement before the trial court or other designated officer for adoption.
 - (2) it shall not be necessary for parties or the mediator to attend court for the purposes of adoption of the settlement agreement and such proceedings may be conducted in chambers or virtually and
 - (3) where the court deems it necessary, it may seek further clarification from the mediator, each party or the party's representative before adopting the settlement agreement.
41. Under Rule 36 of the Rules stated herein, (1) upon the adoption of the settlement agreement, the court shall issue an order or decree in the terms of the agreement which decree and an order arising from the adoption of a settlement agreement shall be enforceable as any other order or decree of the court.
42. Under Rule 36(2), no appeal shall lie against a decree or order of the court arising from a settlement agreement.
43. More importantly, under Rule 39(1) of the Rules, 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 to set aside the order or decree arising from the Mediation Settlement Agreement shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely in setting aside the order or decree.
44. Under Sub rule 3, of Rule 39, the grounds upon which a Mediation Settlement Agreement may be sought in an application for leave to apply are set out namely:
- a. Misconduct fraud, or a fundamental mistake by the Mediator as relates to the mediation proceedings that goes to the core of the matter (which 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 medication 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.
45. From the above provisions of Rule 39 of the Mediation Rules, for one to approach the court for setting aside of the Mediation Settlement Agreement, one must mandatorily first and foremost, file an application for leave to apply for setting aside of the Mediation Settlement Agreement and only with leave of court granted, can a party to the Mediation Agreement file an application, setting out the grounds under Rule 39(3) of the Mediation Rules.
46. In other words, the jurisdiction of the court to hear an application for setting aside of the Mediation Settlement Agreement can only be invoked where leave of court has been sought and obtained prior to the filing of an application for setting aside of the Mediation Settlement Agreement.
47. It therefore follows that where no such leave is first sought and obtained, then the court has no jurisdiction to hear and determine the application for setting aside of the Mediation Settlement Agreement.
48. With the above clear provisions of the law in mind, the question that I must determine is whether leave of court to apply for setting aside of the Mediation Settlement Agreement was sought and obtained by the two applicants herein who were parties to the Mediation Settlement Agreement and to this succession cause?
49. The answer lies in the application under determination herein dated 11th April 2022 and 21st June 2022. In the twin applications, there is no indication that leave was being sought to apply and or that leave had been sought and obtained prior to the filing of the said twin applications for setting aside of the Mediation Settlement Agreement.
50. For that reason alone, the two applications cannot be sustained and are amenable for striking out as being incompetently filed and which incompetence deals a fatal blow to the twin applications.
51. Even assuming that the two applications were properly before this court which is not the case as stated above, there is absolute no evidence of fraud, mistake, misrepresentation, collusion, misconduct, fundamental mistake, legal incapacity, deception, trickery of any party to the Mediation Settlement Agreement as stipulated in Rule 39(3) of the Mediation Rules, by any other party to the Mediation Settlement Agreement.
52. Both parties to the Mediation process were represented throughout by their respective counsel until the end and the Objector's counsel too signed the agreement. There is no complaint that the Petitioner's counsel declined to sign the agreement for some reason to the disadvantage of any of the parties as there is no mandatory legal requirement for counsel for the parties to sign the Mediation Agreement.
53. I find no prove of the ingredients which would warrant the setting aside of the Mediation Settlement Agreement which was arrived at after full participation by the two applicants herein. Furthermore, the Rules do not mandate the Court to seek clarification from the Mediator where there is no reason to so seek for clarification and in this case, I see no reason why the learned Judge could have been obliged to seek clarification from the Mediator. The same Rules permit the Court to adopt the MSA in the absence of the parties. There was no application seeking to block the adoption of the MSA and therefore there was no mandate placed on the court to seek clarification from the Mediator.
54. Accordingly, I find the two applications herein to be devoid of any merit and the same are hereby dismissed with no orders as to costs, parties being family members.



55. The Administrators to collect the certificate of confirmed grant for distribution of the estate of the deceased as per the Mediation Agreement dated 7th December 2021 and adopted by the court on 21st December 2021.

56. Accordingly, this file is closed.

57. I so order.

Dated, Signed and Delivered at Kisumu this 29th Day of September, 2023

R. E. ABURILI

JUDGE

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