

The Role of Court-Annexed Mediation in Resolving Succession Disputes in Kenya: An Appraisal

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1. Litigation of Succession Disputes In Kenya

The law of succession is that branch of law that deals with the way in which a deceased's free property is dealt with after his death. This branch of law is governed by the Law of Succession Act¹. The preamble to the Act states that;

"It is an Act of parliament to define and consolidate the law relating to intestate and testamentary succession and the administration of estates of persons and for connected purposes."

Section 2(1) of the Act states that, "the Act constitutes the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act"; and also allows for application of other laws, save where they are otherwise expressly provided in the Act or any other written law.

This is the statute that deals with both the *substantive* and the *procedural* aspects of how the estate of a deceased person should be distributed. The Civil Procedure Act,² which is the statute that ordinarily governs procedure in civil suits, is therefore inapplicable except where specifically provided for in other statutes, and in this case, vide section 59 of the Civil Procedure Act,³ where mediation is recognized as an alternative dispute resolution method.

The law of succession governs the devolution of property from a deceased person to a new owner... it defines the patterns of devolution and establishes the institutions and structures that control the devolution, with the objective of ensuring a peaceful and orderly distribution of the estate of the deceased.⁴

The manner in which the property will be dealt with depends on whether the deceased died testate or intestate. Section 3(1) of the Law of Succession Act defines a will as, "a legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death duly made and executed in accordance with the Act." The Law of Succession Act defines testate succession⁵ as, "whereby the deceased had left a will in which he states how his property should be distributed." Intestate succession occurs when the deceased did not leave any will and it is left to the courts, or if they are in agreement, to the family and other beneficiaries, to decide how the property should be distributed.⁶ Both testate and intestate succession have their challenges and this paper will show why mediation is best suited to solve the conflicts

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¹ CAP 160.

² Cap 21 Laws of Kenya Revised Edition 2012(2010), National Council for Law Reporting, www.kenyalaw.org accessed 8th November 2017

³ Cap 21 Laws of Kenya, Revised Edition 2012(2010), National Council for Law Reporting, www.kenyalaw.org accessed 8th November 2017

⁴ Musyoka, W, *A casebook on the law of succession in Kenya*, law Africa publishing, Nairobi, 2014 ISBN 9966-7448-5-1.

⁵ Ibid.

⁶ Ibid.

that arise out of both testate and intestate succession. Largely, it is in intestate succession that problems arise because more often than not the beneficiaries cannot agree on how to distribute deceased's the estate.

Testate succession has not been spared either because lately wills are increasingly being successfully challenged in court. Not that there is anything wrong with successful challenge, but the rate is so high that it brings into question whether the deceased wishes are being respected. This may also run counter to the basic principle of succession that the testator should be free to will away their property as they wish. Problems abound because of the time that is taken for the case to be heard and determined. Such problems will be compounded if, upon the decision of the Court, an unsuccessful party decides to appeal.

The period between the filing of the case and its conclusion brings untold suffering to the family and dependants, so that by the time the matter is heard and determined, there have formed rifts where there were none, and chasms where there were disagreements prior to the death of the person whose property is the subject of litigation.

Effects are also financial, emotional, and enmities grow to such an extent as to spark family feuds which may last a life time. This is mostly where the estate is large or valuable.

The family fabric is destroyed. Such destruction has an effect on the economy as well.

2. Conflict Defined

The dictionary definition of conflict is "a serious disagreement or argument, typically a protracted one ... or serious incompatibility between two or more opinions, principles, or interests"⁷. A conflict therefore is a clash of interests, actions, benefits, values and opinions between people which are serious and prolonged. Conflicts are therefore more serious than just disagreements because the level of disagreement in a conflict is so high that it cannot be resolved by negotiation between the parties themselves. Further conflicts may exist because of perceptions of the issue are different and therefore a disagreement may exist only in the mind of one person when in actual fact it no conflict, or such conflict is different from that which that person perceives it to be.

According to a leading psychologist, there are three types of issues that concern the parties in every conflict; substantive, emotional ad pseudo substantive issues.⁸ Taken at face value, substantive issues are matters that concern the participants and therefore are the problem to be solved or the question to be decided⁹. Emotional issues are categorized into four, namely issues of power, approval, inclusion, justice and identity. These emotional issues are the ones that underlie arguments about substantive issues. Therefore, substantive issues are felt to be important only to the extent that they are vehicles for emotional issues. Pseudo substantive issues on the other hand are emotional issues that are disguised as substantive issues¹⁰.

Issues are pseudo substantive to the extent that they serve to satisfy individual needs related to emotional issues¹¹.

⁷ Oxford learner's dictionary.

⁸ Dana, D., *Managing Differences: How To Build Better Relationships At Work And Home*, MTL, 4th ed. , 2006, p.125

⁹ *Ibid.*, p.126.

¹⁰ *Ibid.*, p.131

¹¹ *Ibid.*, p. 131.

The courts are ill qualified to deal with such issues. All that the courts need to do and always do is to determine the facts as before them and in accordance with the evidence and the law. Once conflict exists, the parties can either try and solve the conflict themselves or use formal and established means to settle that conflict. In Kenya, the Constitution recognizes that the formal mechanisms are the courts and tribunals formed thereunder have the exclusive mandate to solve conflicts. That is why mediation is important and best suited to resolving family disputes because they are usually emotionally driven more than they are driven by a quest for following the strictures of the law.

2. Mediation Defined

Mediation is a process where a neutral third party (the mediator) helps the parties articulate and understand the underlying perspectives, interests, issues, values and feelings that each person brings to the conflict; generate and evaluate options to resolve the issues presented; and gain consensus around mutually acceptable options¹². The mediator does not make a decision, and neither does he suggest one. It is the parties themselves that will be responsible for crafting their own solution to the problem. All that the mediator does is to be present, arrange the meeting and facilitate communication between the parties. Once a solution is reached, then the mediator will reduce it into an agreement which the parties sign. The process is voluntary, private and consensual.

2.1 The legal and regulatory framework of mediation Kenya.

Article 159 (2) (c) of the Constitution of Kenya 2010 states that Courts should promote the use of Alternative Dispute Resolution (ADR) Mechanisms such as Mediation, Arbitration, Conciliation, etc. However, it does not make the use of ADR mandatory. This means that parties are free to choose any ADR mechanism that they find suitable. The Civil Procedure Act,¹³ was amended in section 59 by a legal notice¹⁴ to provide for Court mandated mediation.

Pursuant to that, the Mediation (Pilot Project) Rules 2015 were promulgated and came into force in April 2016¹⁵. The pilot project was to be undertaken in Nairobi Milimani Commercial Courts for a period of one year, and, if successful, to be rolled out gradually throughout the country. The effect of these rules was that any cases that were filed in the Commercial or Family divisions of the High Court at Milimani Commercial Courts in Nairobi after the coming into force of these rules could not proceed as before. Such cases have to first be screened by the Mediation Deputy Registrar in order to assess their suitability for settlement by mediation. If so found suitable, such cases would be referred to mediation, where the mediator would be chosen by the parties from a list of mediator accredited by the judiciary. Succession cases fall squarely within the Family Law Division of the High Court in Milimani Commercial Courts, Nairobi, and therefore an attempt to resolve them must be first made in accordance with the Mediation (Pilot Project) Rules 2015.

One of the functions of the Mediation (Pilot Project) Rules 2015 was to create a committee to accredit mediators who will take up cases filed at Milimani commercial courts. Once the mediator is successfully appointed, the mediation is supposed to be concluded within sixty days (except in special circumstances where an extension of a further ten days is given) and the mediator is to file his report within ten days of the conclusion of the mediation. In the event that the mediation was fully successful and the parties had

¹² Love, L.P., Mediation Of Probate Matters: Leaving A Valuable Legacy, *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2001, 255.

¹³ Chapter 21 Laws of Kenya, Government Printer, 2010

¹⁴Legal Notice number 197 of 2015

¹⁵Legal Notice number 197 of 2015

reached an agreement, then such agreement is adopted as judgment of the court and is not subject to appeal. Where the parties could not reach an agreement, then the mediator files his report to that effect and the parties are to continue with the case in the normal way. It should be noted that during the time when the matter is referred to mediation, any time limit that is imposed by the Civil Procedure Rules is suspended until the mediation is concluded. If successful, the project was to be launched throughout the country.

2.2 The Success of The Pilot Project So Far.

A preliminary report by the Judiciary¹⁶ shows that the pilot project has been successful. During the launch of his Blueprint, the Chief Justice Hon. David Maraga, promised Kenyans that he would embark on clearance of backlog by initiating Alternative Dispute Resolutions mechanisms with the Judiciary annexed mediation being a key plank of this strategy¹⁷. Since its launch in May 2016, Court annexed Mediation has successfully resolved about 50 cases with an estimated cost of KShs 500million¹⁸. The average time frame of resolving the disputes is sixty days¹⁹. The World Bank has also hailed the success of mediation²⁰ in Kenya in its feature story of 5th October 2017 where it reported as follows;

“Kenyans are no strangers to waiting for justice. Cases in its civil courts take an average of 24 months to conclude, largely because of the limited number of magistrates and judges available to hear them, but also because of the long distances between courts and the places where most Kenyans live. As a result, Kenya’s judiciary has a massive backlog of civil cases, prompting it to explore alternatives...”

The average time taken to settle cases via mediation was 66 days, or two months, compared to two years through the normal court process. The information shared during mediation sessions is confidential and is not admissible as evidence in court. The 60-day mediation period is capped, unless the Court grants an extension. There is no appeal process, providing some certainty a matter will be concluded once and for all. However, should no settlement be reached, the case reverts to the courts. Mediation has the potential to address complex cases, including those involving companies in conflict. It is not bound by the rules of litigation, allowing more space for creative resolution. It is a solution by the parties, for the parties. The judiciary’s goal is to normalize mediation in all courts.”²¹

The shortcoming here is that because the reference to mediation is made by the court, parties may feel that their independent decision to go for mediation has been interfered with, hence the mediation as proposed by court will remove the aspect of “independence” because the decision to go to for mediation will have been made for them by the court rather than by the parties themselves.

3. Why Mediation Works

¹⁶<http://www.judiciary.go.ke/portal/page/reports>, posted on 27th February, 2017 (accessed on 14th November 2017).

¹⁷<http://www.judiciary.go.ke/portal/page/reports>, posted on 27th February, 2017 (accessed on 14th November 2017)

¹⁸ <http://www.judiciary.go.ke/portal/page/reports>, posted on 27th February, 2017 op.cit.

¹⁹ <http://www.judiciary.go.ke/portal/page/reports>, posted on 27th February, 2017 op.cit.

²⁰<http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>. (accessed 14th November 2017).

²¹<http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>.

In mediation, parties are more concerned with what works for them rather than rights. It is therefore normal in mediation for parties to come to a solution that may not make sense to other people, or which defies logic, so long as the solution is acceptable to the parties and is not illegal. To this end, therefore, mediation takes care of the parties' emotional, substantive and pseudo – substantive needs and issues. It is for this very reason that mediation succeeds and remains the preferred method of solving family disputes.

In other dispute resolution mechanisms, the solutions to the dispute may have been imposed on the parties (e.g. litigation, arbitration, adjudication), or even suggested by the third party neutral (e.g. conciliation, early neutral evaluation, mini trial, dispute resolution bards) and binding (litigation and arbitration). Such other dispute resolution mechanisms do not last long and do not give the kind of party satisfaction and party involvement that comes with mediation. The solutions therefore sit comfortably with the parties because they crafted them.

The confidentiality aspect also means that the parties more readily give out information which helps in solving the dispute faster and more conclusively than would have been the case in other forums.

Mediation is more suitable where the relationship of the disputing parties is important to them and has to continue even after the dispute has been resolved. Unlike in litigation where the disputing parties do not care about the aftermath following a decree, mediation seeks to and ensures that the cordial relationship that existed before the dispute actually survives the brunt of the dispute. In litigation, the converse is often the case.

In succession matters, the dispute is about the distribution of the deceased's property between siblings, mother (or father) and children, and other dependants who are usually family members as circumstances will dictate. The disputants will still remain as part of one family because they are related. They will meet in birthdays, funerals, weddings and other family functions like harambees and get together. They will still need each other in their future and their family functions are interdependent. This is especially so in the African context where family relations are valued and protected through culture and association.

As one prominent mediator²² observes;

"Of all of the cases I have mediated over the past 30 years, the most challenging and rewarding disputes have been those between family members over family property, estates, trusts and businesses. Brothers and sisters may fight over partnership property, but they are really sorting out old issues of sibling rivalry and dominance. Once a patriarch or matriarch of a family has given up control or passed away, adult children are often left in a position of ambiguity or, worse, contrary beliefs about their rightful role. Disputes surface that are usually less about malevolence than about conflicting feelings, misunderstandings of intent, divergent expectations, and resistance to change or unspoken fears. The tremendous financial cost of litigation is only one downside of an intra-family lawsuit. Court pleadings and proceedings are public. One of the principal advantages of private mediation over litigation of sibling and intergenerational family disputes is the confidentiality provided in keeping family fights from the public eye. The light of publicity often cements positions and makes compromise more difficult. There are, of course, other advantages of working out a settlement among warring family factions, including reconciling differences and healing. Courts are limited in the remedies they can impose and framing family disputes in legal terms inhibits the parties' ability to invent or accept creative solutions. Litigation rarely heals differences or promotes understanding"

²²Folberg, J, "Mediating Family Property and Estate Conflicts: Keeping the Peace and Preserving Family Wealth," *JAMS Dispute Resolution ALERT*, Vol. 9, No. 2, 2009.

From the above, it is quite clear that parties in dispute will be more interested in the emotional issues and in deed be driven by them rather than the substantive issues in the dispute.

The process is party driven, hence party satisfaction that they contributed to the decision. Further more, the final decision is made by the party themselves hence long lasting and not easy to resile from.

3.1 The importance of confidentiality and informality to resolving succession disputes.

Probate, trust, and guardianship matters often involve family secrets and dispute that are embarrassing to the parties. The confidentiality of mediation may encourage families to speak more openly and allow the true reasons for the disputes to emerge more quickly. Privacy is particularly important to those parties who value "not airing the family's dirty laundry" in public²³. Moss²⁴ describes the advantages of early mediation as follows:

"Disputes are usually more likely to be settled through mediation when mediation is recommended early. For example, when a dispute arises between a fiduciary and a beneficiary involving interpretation of the trust agreement, there is a high probability of success if the parties attempt to have their disagreement mediated before a lawsuit is filed. The parties should be able to compromise before either side becomes too inflexible in the "rightness" of their position".

Additionally, parties who will continue to live or operate in the same social or business community may benefit from a "discreet conclusion" to their problems. Both the confidentiality and informal nature of mediation give the parties the opportunity to deal with the emotional issues of a case. Disputes in the context of probate, trust, or guardianship law may result in the tangible manifestation of long -standing family problems (e.g., sibling rivalry, perceived favoritism, jealousy over or disapproval of a marriage or other relationship).²⁵ Parties in these cases may sometimes seek no more than an "emotional" result; an apology perhaps or an opportunity to vent anger over a situation they perceive as unfair²⁶.

More importantly, the courtroom is not the appropriate arena for the airing and potential resolution of the underlying emotional issues." The emotional context should be considered when planning the timing of a mediation. Typically, early mediation is recommended²⁷. However, the parties to a will contest may still be in the process of grieving over the loss of a family member²⁸. Similarly, the parties in a guardianship case may still be confronting the shock of the visible decline in capacity of a loved one. The

²³ Schmitz, S.J, *Mediation and the Elderly: What Mediators Need to Know*, MEDIATION Q., Fall 1998, at 71, 74.

²⁷Moss.F.S, *Mediating Fiduciary Disputes*, app. A at A-4 (1998) (unpublished manuscript, on file with author). Even though early mediation is recommended as a time and money-saver, Moss points out that it can also be quite successful when litigation has run for such a protracted period of time that the parties have become frustrated. Also, she notes that a second mediation may be successful even if an earlier one was not. Finally, a mediation, even if unsuccessful, may serve a benefit by facilitating the collection of information in a way far less costly and time-consuming than formal discovery. See *id.* at A-5.

²⁵ Gary S.N, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 424 (1997).

²⁶ Gary S.N, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, (1997). *op. cit* at pp 426-427

³⁰ Professor Gary states "grief may be a factor in the dispute itself, since the desire to blame someone for the death of a loved one may lead to a lawsuit." *op. cit*, p 432.

³¹ Gary *op cit*, p 421. "If the mediation process is commenced too early in [the grieving process, the parties may be ill-equipped emotionally to make rational decisions that will permit settlement of the controversy." Hewitt, *supra* note, at p 41.

³² Gary S.N, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, (1997). *op. cit* at pp 426-427.

strong emotions surrounding a death or pending disability may well hamper the parties' ability to think clearly, either in the context of litigation or of mediation.²⁹

4.0 Why Litigation is Inadequate in Resolving Succession Disputes

Before the entrenchment of Mediation in the Constitution of Kenya 2010 and the subsequent rolling out of the Mediation Pilot Project by the Judiciary by the enabling statute (the Civil Procedure Act), the courts handled all successions matters through litigation, except where the parties entered into consent and settled the dispute amicably.

In the Matter of the Estate of GKK (Deceased) Succession Cause No.1298 Of 2011³⁰, which was filed before the promulgation of the Mediation (Pilot Project) Rules 2015, shows the difficulty that the parties, their advocates and the courts themselves go through during the litigation of a succession dispute. In that case, during the hearing of an application to determine the validity of two rival wills, the following were agreed as the issues for determination³¹;

- “(i) To probe the two Wills on record so as to determine;
 - (a) their authenticity and legality,
 - (b) What the estate of the Late GKK is comprised of,
 - (c) The Executors of the Will,
- (ii) All other issues regarding the estate shall await the outcome of the Probate of the Will”

In his ruling dated 16th June 2013, Isaac Lenaola J (as he then was), made the following observations:

“Right from the onset, I must state that this matter was very emotive and was highly contested. I also spent considerable time in Court in a bid to assist the beneficiaries temporarily secure the assets of the deceased. I allowed the beneficiaries to participate in the proceedings and address the Court by counsel or in person as they wished in order to ensure that they understood the proceedings from time to time. I also ensured that all orders on record were made by consent to minimize conflicts during the long hearing period”³².

It is proper to conclude that the efforts made by the courts to prevent further conflict even during the time of the hearing and pending the ruling, when the family members could not see eye to eye, bore no fruit. This in itself is supportive of the importance of mediation in such disputes. In the same ruling, the learned judge stated thus;

“During the hearing, I noticed that the family was divided into two distinct camps; one that was led by TW and AK and the other clearly led by AK. *Both Maraga J. (as he then was) and myself, tried to put in place measures to save the large estate from depletion but neither AK nor AK were able to work together and jointly with JK to manage the estate*³³. *The fact that they had the guidance of seasoned advocates did not help the situation. JK, in my view, is a genuine old man*

³⁰In Re Estate of G.K.K (Deceased) [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/98909/> accessed 20th November 2017.

³¹ In Re Estate of G.K.K (Deceased) [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p. 2.

³² In Re Estate of G.K.K (Deceased) [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p.14

³³ In Re Estate of G.K.K (Deceased) [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p. 23

with the sole interest of guiding his divided brother's family but in the end the venom exhibited by both camps made him ineffectual... It must be understood that the intention of the Law of Succession Act is the eventual distribution of a deceased's estate. In the present case, whether or not I had validated one of the two Wills, the K family saga would not have ended" (emphasis supplied)."

From the foregoing, it is clear that advocates for both parties could not prevail upon their clients to maintain good relationships. It can be implied that since this hearing was conducted before the promulgation of the mediation framework, the advocates appearing for the parties were not trained in mediation and therefore could not properly advise or control the parties.

As regards emotional issues, it is also apparent that despite the courts best intentions and efforts to keep the family together, it did not manage to do so. This vindicates the advantages of mediation over litigation because the learned judge, noble as he was in his intentions, was not mediating the dispute but was making a finding on the issues for determination as was placed before him.

The issues themselves were legal issues and did not include any emotional issues which would have been of vital importance to the parties had the dispute gone to mediation. The learned judge concluded by stating;

"I have sat for one year and I have seen the conduct of each beneficiary. There is no goodwill on any side and sadly, it is the whole family that will continue to suffer, unless sanity prevails"³⁴.

5.0 Conclusion

The author is of the considered opinion that whilst some gains have been made in reducing the backlog of case in the family division (54%), the judiciary would have made more meaningful gains if certain measures are put in place. This opinion is fortified by the fact that mediation resolves a much higher percentage of family disputes world wide. Going forward, it is suggested that the Law of Succession Act be amended to provide for parties to go for mediation before filing their case in court. This will further reduce the cases that go to court as they can easily be settle before then. Further, the training of advocates and judicial officers on mediation should be made mandatory. It would also help to mandatorily require advocates to advise their clients to try mediation before taking instructions to proceed to litigation. This is the usual practice in jurisdictions where mediation has taken root.

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