

THE ROLE OF MEDIATION IN
SETTLING DISPUTES IN SUCCESSION
MATTERS IN KENYA: AN
EXPLORATORY STUDY.

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- METHODOLOGY
- Desk research was employed in this study and reference was made to the Constitution of Kenya 2010, Statutes, Case Law and Journal Articles.

- **DEFINITION**

- Mediation is a voluntary Alternative Dispute Resolution (ADR) mechanism, being an alternative to litigation, where the parties in a dispute achieve a settlement themselves with the aid on an impartial and independent third party, called a Mediator, who is chosen by parties to the dispute.

- It is non binding in the sense that any party is free to pull out of the Mediation process at any time. However, once a settlement is reached, it is an agreement that can be enforced and adopted in Court.

- Mediation is important 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 disputes, this is pivotal as the dispute is about the distribution of the a deceased's property between siblings, mother (or father) and children, and other family members as circumstances will dictate.

CURRENT STATUS OF THE LAW AND MEDIATION

- **The Constitution of Kenya 2010**

Article 159 of the Constitution 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 Cap 21**

- This has been amended in section 59 to provide for Court mandated mediation. It makes it *discretionary* for disputes to go for mediation before being litigated. The shortcoming here is that because the reference to mediation is discretionary, parties may *never* go for mediation.

- Section 59B(1) states that the court
“may
- (a) on the request of parties
- (b) where it deems it appropriate
- © where the law so requires direct that any suit presented
before it be referred to mediation”

The Law of Succession Act Cap 160 Laws of Kenya

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(section 2) The Civil Procedure Act is therefore inapplicable except where specifically provided for.

The inapplicability of the Civil Procedure Act then means that Succession disputes are not within the ambit of those that should be referred to Mediation. This poses a challenge as Succession disputes are quite amenable to being resolved by Mediation.

NOTABLE CASE LAW

- Disputes may arise out of testate or intestate succession.
- Testate succession is where the estate is distributed pursuant to a Will. Testamentary freedom gives the Testator the right to will away his property as he wishes except in circumstances where doing so will amount to disinheriting his dependants.
- The noble intention of a Will is to ensure that the estate is distributed efficiently, in an orderly manner and without disputes and according to the wishes of the maker. Sadly , this is not the case as the Will is often challenged in court leading to protracted legal battles.
- Intestate succession brings with it even more challenges and bitter disputes between family members.

NAIROBI SUCCESSION CAUSE NO. 1239 OF 2008, IN THE MATTER OF THE ESTATE OF JAMES KANYOTU (DECEASED), JANE GATHONI MURAYA VERSUS MARY WANJIKU KANYOTU & 9 OTHERS

- The deceased died on 13th February 2008. A dispute arose as to the distribution of his Estate. By a Ruling dated 8-11-2013, the court ordered the beneficiaries to agree on the distribution of the Estate failing which the Court will make the distribution
- They failed to agree. The matter is still pending in Court. The Judgment may be appealed against, further prolonging the legal battle.

NAIROBI SUCCESSION CAUSE NO. 1298 OF 2011, IN THE MATTER OF THE ESTATE OF GKK (DECEASED)

- The deceased died on 21-12-2010. the succession Cause was filed in 2011.
- There were two Wills allegedly written by the Deceased and they were conflicting.
- The High Court annulled the two wills by a ruling dated 6-6-2013 and declared that the Deceased had died intestate.

- Justice Lenaola said that there was no goodwill from any of the sides and “sadly it is the whole family that will continue to suffer unless sanity prevails.”
- “The fact that they had the guidance of seasoned advocates did not help the situation. James in my view is a genuine old man with the sole interest of guiding his divided brother’s family. But in the end the venom exhibited by both camps made him ineffectual,” the Judge said.

CONCLUSION

- The following is apparent from the foregoing study;
- 1. Succession cases take long to conclude
- 2. Court cases cause or widen rifts in families
- 3. The mediation mechanism is not adequately catered for in Succession matters in Kenya
- 4. Mediation is key in succession dispute resolution.

RECOMMENDATIONS

- 1. Amendment of Law of Succession Act to include a mediation clause making it a prerequisite to try mediation before filing a case.
- 2. Sensitizing the public and all stake holders on the existence and benefits of Mediation.
- 3. Setting up by the Government Legal Aid Scheme for paying the cost of Mediation to encourage this form of dispute resolution
- 4. section 59 (C) of CAP 21 envisages a situation where statute has been enacted / amended to require mediation; hence it is proposed that CAP 160 be amended to allow for mediation in Succession matters

***THE END,
THANK YOU***