**Ngari v Ngari & 5 others; Kabuthi & another (Interested Parties) (Succession Cause 377 of 2012) [2023] KEHC 19298 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19298 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE 377 OF 2012**

**LM NJUGUNA, J**

**JUNE 27, 2023**

**BETWEEN**

**DAMIANO KARIUKI NGARI ..... PETITIONER**

**AND**

**SILAS NJAGI NGARI ..... 1ST RESPONDENT**

**PATRICK NJIRU ..... 2ND RESPONDENT**

**FLORA AGNES WANJA NDWIGA ..... 3RD RESPONDENT**

**ROSE JANE NJOKI BERNARD ..... 4TH RESPONDENT**

**TERSIA WANJIRU NDWIGA ..... 5TH RESPONDENT**

**FELISTA CIUMWARI ..... 6TH RESPONDENT**

**AND**

**PATRICK NDWIGA KABUTHI ..... INTERESTED PARTY**

**DOMINIC MAGITI SAMUEL ..... INTERESTED PARTY**

**RULING**

1. The matter for determination before the court is an application dated April 16, 2021 wherein the applicants sought for orders that:

    i. An order for review do issue against the ruling delivered by this Honourable court on the October 22, 2020.

    ii. Proceedings before the court on October 22, 2020 adopting the mediation settlement agreement dated December 13, 2019 as an order of the court be set aside and/or expunged from the court records.

iii. The matter be set down for hearing de novo.

iv. Costs of this application be provided for.

2. The application is premised on the grounds on its face and it's supported by the affidavit of Patrick Ndwiga Kabuthi.

3. The application in a nutshell seeks for review of the order dated October 22, 2020 adopting a mediation settlement agreement dated the December 13, 2019 on the grounds that the same was erroneous as the applicants and the petitioner were not in court when the mediation agreement was adopted as the order of the court. That during the mediation sittings, the mediator was hostile to the applicants in that, only the family members were allowed to attend the same. It was their contention that they were not privy to any information contained in the mediation settlement agreement that was presented and later adopted by this Honourable court. The applicants contended that their right to be heard was therefore infringed and as a result urged this court to allow the prayers sought.

4. The 3rd, 4th and 6th respondents filed a replying affidavit sworn on November 25, 2021 stating that the mediator conducted an impeccable mediation process and that the applicants were present all through in as much as they are not beneficiaries of the estate. That the mediation was a success and as a result, the same was adopted as an order of this court. They stated that the application herein has been brought after an undue and unreasonable delay contrary to provisions of Order 45 of the *Civil Procedure Rules* and that the said application is only geared towards frustrating the ends of justice by delaying the completion of the matter herein. That the above notwithstanding, as a family, they are willing to transfer Plot No 50 Ishiara to the 1st applicant. It was their case that the applicants who claim to be purchasers in respect to the estate herein can still file civil suits against the estate in respect of their claims.

5. The petitioner filed an affidavit sworn on November 29, 2021 wherein he deposed that it is true that the applicants were locked out of the mediation proceedings and that only the family members were allowed to participate. That the mediation settlement agreement does not reflect the wishes of the parties herein as evidenced by the 3rd,4th and 6th respondents' willingness to transfer to the 1st applicant Plot No. 50 Ishiara. It was his case that the settlement did not take into account the interests of the applicants and yet he is aware that the 1st applicant purchased Ishiara Plot No 50 while the 2nd applicant also purchased Nthawa/Siakago/862 from their parents. He prayed that in the interest of justice, all the parties deserve to be heard and as such, the prayers herein be allowed.

6. The court gave directions that the application be canvassed by way of written submissions and the parties complied with the directions.

7. The applicants submitted that the mediation settlement was adopted in the absence of their counsel and the petitioner. That given that the applicants' right to be heard was curtailed, this court therefore should be pleased to review its orders as prayed. Further, it was contended that the applicants did not append their signatures on the settlement agreement, the consent is one based on fraud and reliance was therefore placed on the case of *Board of Trustees National Social Security fund v Michael Mwalo [2015] eKLR*. It was reiterated that the settlement did not represent the wishes of the parties herein and therefore, the same ought not to be allowed to stand; underscoring the importance of unanimity in such settlement. To support this proposition, the applicants relied on the case of *In re Estate of Loise Nduta Murirui (Deceased) [2018] eKLR*. In the end, this court was urged to allow the prayers as sought.

8. The petitioner submitted that there are sufficient reasons to warrant the review of the court's orders in that the applicants herein were locked out of the mediation sessions by the mediator for the reason that they are not family members. That the applicants did not therefore sign the agreement as they were not given an opportunity to be heard. The petitioner relied on the case of *In re Estate of Jotham Boaz Odundo (Deceased) [2021] eKLR*. That further, the dispute between the parties herein revolves around the distribution of Ishiara Plot No 50 and half share of Plot No Nthawa/Siakago/862 claimed by the applicants. It was contended that the mediation agreement adopted does not allocate the two parcels of land or any other parcels to the applicants. To buttress the fact that indeed the agreement does not show the wishes of the parties herein, the petitioner pointed out to the fact that the respondents have indicated that they are agreeable to transfer Plot No 50 Ishiara to the 1st applicant. That the mediation sessions ran into the night with the outcome being in favour of the respondents and they colluded with the mediator. Reliance was placed on the case of Board of Trustees National Social Security fund v Michael Mwalo [2015] eKLR. In the end, this court was urged to allow the prayers sought.

9. The 3rd, 4th and 6th respondents submitted that the applicants are neither beneficiaries nor dependants of the estate herein. That the mediation process was properly conducted, the settlement amicably arrived at and each party signed and therefore, there is no reason to have it set aside. It was submitted that the applicants have not stated the discovery of new and important matter or evidence which was not within their knowledge or which they could not produce after the exercise of due diligence at the time of the signing of the consent agreement. Additionally, that no sufficient cause has been shown to persuade this court to issue the orders sought. Reliance was placed on the case of *EOM MLO & SMO (minors) suing through their next friend and mother DMN [2021] eKLR*. Further, it was submitted that the application herein has been filed unreasonably late and no explanation has been offered for the same and therefore, the same ought to fail. That the adoption of the said agreement was done in the absence of the applicants and petitioners advocates but an email had been sent to the parties informing them of the impending adoption but the parties failed to attend court on the said date.

10. They argued that the fact that the said agreement was adopted in the absence of the parties is not a ground enough for the order to be set aside. Further, it was their case that there is no evidence that the applicants were denied a chance to participate in the mediation proceedings. That they did not make an application seeking the court's intervention, and therefore, there is no reason for the said order to be set aside; reliance was placed on the case of *NKM Vs SMM & another [2019] eKLR*. The 1st applicant's claim was however conceded to and in the end, this court was urged to dismiss the application herein as the same is bereft of merit.

11. The application is brought under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.

12. Section 80 provides as follows;

> ' Any person who considers himself aggrieved-
>
> (a) By a decree or order from which an Appeal is allowed by this Act, but from which no Appeal has been preferred; or
>
> (b) By a decree or order from which no Appeal is allowed by this Act, may apply for a review of judgment to the Court, which passed the decree or made the order, and the Court may make such order thereon as it thinks fit'

13. I have considered and analyzed the pleadings and the submissions by the parties and it is my view that the main issue for determination is whether this court can review and/ or set aside the order it adopted from a mediation process previously entered by the parties herein.

14. The Court of Appeal in *Wangechi Kimita & Another v Mutahi Wakibiru [1985] KLR 317; [1986] KLR 578; 1 KAR 977; [1976-1985] EA 229*, while citing *Sadar Mohamed v Charan Singh [1959] EA 793* expressed itself as follows:

> ' Notwithstanding the contractual effect of a consent order Section 67(2) of the *Civil Procedure Act* is not a bar to setting aside a Judgment and decree by consent or grounds which would justify setting aside a contact.'

15. With respect to the grounds upon which such a consent would be set aside, the Court in *Flora N Wasike Vs Destimo Wamboko [1988] KLR 429* held that; it is well-settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract entered into by the parties, or if certain conditions remain unfulfilled, which are not carried out. In other words, prima facie, a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.

16. The East African Court of Appeal on its part in *Brooke Bond Liebig (T) Ltd v Mallya Civil Appeal No 18 of 1975 [1975] EA* 266 expressed itself as follows;

> ' 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 on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court. or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.'

17. This court notes that the 3rd, 4th and 6th respondents contend that the order being sought to be reviewed and/or set aside by the 1st and 2nd applicants, arose from a mediation process.

18. In *Hirani v Kassam [1952], 19 EACA 131*, the Court of Appeal with approval quoted the following passage from Seton on *Judgments and Orders, 7th Edition, Vol 1* p.124 as follows:

> ' 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 on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.'

19. Further, in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co Ltd [1982] KLR P 485* it was held that:

> ' A consent order entered into by counsel 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 by an

agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.'

20. Of importance to note is the fact that Mediation is an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. Like was stated by Judge PJO Otieno in *Amcon Builders Ltd v Vintage Investments Ltd & Another [2018] eKLR*, the mediator merely guides the parties by setting an atmosphere for mutual, candid and honest discussions. He makes no determination. Where the parties have agreed on all, or some of the issues in dispute he helps in the drafting of the agreement which is then owned by the parties by them appending their signatures. The agreement, known as the mediation settlement agreement, is then filed in court which adopts the same as the order or judgment of the court. The agreement becomes enforceable.

21. From the record, it is quite evident as noted by the court that the mediation settlement agreement dated December 13, 2019 was presented to the court by the mediator in the presence of the counsels for the 1st – 7th protestors. The court therefore proceeded to adopt the agreement as the order of the court.

22. Further, from the record, it is clear that the 2nd applicant purchased Nthawa/Siakago/862 from the petitioner, Daminao Kariuki as noted in the sale agreement dated 08.06.1997 while the 1st applicant claims Plot Numbers Ishiara Plot No 50 from the estate herein. As already noted, the 3rd, 4th and 6th respondent conceded that they are willing to transfer Plot No 50 Ishiara to the 1st applicant while the other applicants who claim to be purchasers in respect to the estate herein should file civil suits against the estate in respect of their claims. It remains unclear under what circumstances the 1st applicant acquired the said Plot No 5 Ishiara but what remains uncontroverted is the fact that the 3rd, 4th and 6th respondent conceded that they are willing to transfer the said plot to him and further, the petitioner also submitted that the 1st applicant bought the said land from the deceased herein.

23. The above notwithstanding, it is clear that the consent agreement included all the respondents listed herein as they are children of the deceased and as such, rightful beneficiaries. In the same breadth, it is important to note that they are also bound by the terms of the mediation settlement agreement and therefore the question that remains unanswered is whether they (1st, 2nd and 5th) also concede to the proposal by the 3rd, 4th and 6th respondents that indeed Plot No 50 Ishiara should be transferred to the 1st applicant. I say so for the reason that it is only the 3rd, 4th and 6th respondents who participated in this application and conceded to the transfer of Plot No 50 Ishiara to the 1st applicant. The position of the rest of the other beneficiaries/respondents in this regard, is unknown. Further, the agreement shows that the said Plot No 50 Ishiara was to be retained by the nine children of Celina Mbiro Ngari (Deceased) and therefore, the concession in my view remains clouded as the other parties have not indicated whether they are agreeable to the same.

24. In the same breadth, it is quite evident from the record that the 2nd applicant purchased Nthawa/Siakago/862 from the petitioner who was simply a beneficiary of the estate and hence had no capacity to deal in the estate as exhibited. In that regard, I hold the view that the said applicant has no capacity to move this court for any relief as he is a stranger to the estate of the deceased; his recourse therefore lies elsewhere.

25. From the record, it is clear that the parties herein agreed to the said agreement and even if it may look unfair, the parties themselves authored the whole consent. [See *Brooke Bond Liebig (T) Ltd v Mallya Civil Appeal No 18 of 1975 [1975] EA 266].*

26. It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended, the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed

by the Court of Appeal in the case of *David Sironga Ole Tukai Vs Francis Arap Muge & 2 others Civil Appeal No 76 of 2014 [2014] eKLR* thus;

> ' In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.'

27. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised in their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

28. As a consequence of the above, can the orders be reviewed? [See Order 45 of the Civil Procedure Rules].

29. An error within the meaning of Section 80 and Order 45 of the Civil Procedure law was defined in the case of *National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR* , the Court of Appeal as thus:-

> ' A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law'.

30. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd v Ndungu Njau [1979] eKLR.

> ' A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.'

31. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

32. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of *Stephen Wanyoike*

*Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another [2018] eKLR* the Court of Appeal stated as follows:

> ' We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.'

33. As I have already stated in this ruling, the statutory grounds upon which orders for review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made. Thirdly, that there is sufficient reason to occasion the review.

34. However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, 'sufficient reason' ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline.

35. In my considered view, the applicants participated in the mediation proceedings and in any event, they are third parties to the estate of the deceased. In the premises, I find that:

    i. The application before the court is bereft of merit and is hereby dismissed.

    ii. No order to costs.

36. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.**

**L. NJUGUNA**

**JUDGE**

**.....for the Petitioner**

**.....for the Respondents**

**.....for the Interested Parties**