REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 55 OF 2013

LKM.....APPLICANT

VERSUS

IWK.....RESPONDENT

RULING

1. The applicant LKM and the respondent IWK got married in 1989 under Kikuyu customary law. They were blessed with two children: ENK. born on 21st February 1991 and MMK born in September 1995. They are now adults. The marriage was dissolved on 6th December 2017.

2. On 10th September 2013 the applicant filed originating summons against the respondent seeking a declaration that the property known as Plot No. xx Kariobangi South at [Particulars Withheld] situated in Nairobi and jointly registered in their names is jointly owned in equal shares, and also that the household goods bought by them was jointly owned in equal shares. His case was that these were matrimonial properties that they directly and indirectly contributed to their acquisition, and that each party was entitled to equal share.

3. The respondent filed a replying affidavit on 6th February 2018 to state that she was the one who had identified the plot and bought, and subsequently she had contributed a larger potion towards its development from ground floor to fourth floor. Since the applicant's contribution was minimal, she offered to buy him out. But, if the court found that they had equally contributed to the purchase and development of the property, she sought to be compensated for what she had spent on the children's needs and expenses and what she had paid to buy and develop the property, before the net proceeds were shared out.

4. The dispute was referred to Court Annexed Mediation. On 13th February 2019 a Mediation Settlement Agreement dated 12th February 2019 was filed into the court by the mediator Rev. Geoffrey Njenga. The gist of the agreement was that the plot and its development would be valued and sold. The proceeds would be shared so that each gets 30%, ENK would get 15% and MMK would get 25%. The parties would collect the documents they had deposited with Equity Bank Thika branch to enable the process, and that the applicant would remove the caveat he had registered against the property. Upon receipt of the valuation report, the respondent was going to pay to the applicant 30% of the valued amount. In essence, the applicant agreed to be bought out. Lastly, the parties were to equally share the cost of valuation.

5. On 11th March 2019 the court adopted he Agreement as an order of the court. By the time, the applicant had written a letter of protest to the court saying that he wanted to revoke the Agreement because the mediation had not been properly conducted; that the mediator had asked him to remain out of the room as he discussed with the lawyer of the parties: that when he was called in he found the Agreement; that the Agreement did not take into consideration a number of issues he wanted discussed.

6. In the present Notice of Motion dated 3rd April 2019 he sought that the Agreement be set aside and/or reviewed on several grounds. First, that by the time the Agreement was adopted as order of the court he had protested; the mediation was hastily conducted; the mediator forced him to sign the Agreement and did not allow him to raise the issues that were outstanding; and he was not given a copy of the Agreement despite asking for it. He stated that the mediation was over in two days, on 6th February 2019 and on 12th February 2019.

7. There is no dispute during the mediation each party was accompanied by a lawyer, each of whom signed the Agreement.

8. The response by the respondent was that the mediation had been conducted properly, the Agreement had been arrived at amicably and that each party and the lawyer had signed it without coercion.

9. Both sides agreed in their respective affidavits that when they went for mediation, the mediator explained the process to them after introductions. They were informed that mediation entailed give and take. Each party was asked to give his version of the dispute. The position of the lawyers was that the parties had each contributed to the property, and that the contribution be taken into consideration. The mediator then had a private session with each party.

10. One of the issues the applicant had a problem with was their adult children had been drawn into the dispute and made to benefit, when this was a matrimonial property between him and the respondent. The response by the respondent was that the issue for the children and their benefit was discussed between the parties and agreed on. Lastly, the complaint by the applicant was that the Agreement was in the handwriting of the respondent's lawyer. The respondent stated in response was that initially the applicant's lawyer was asked to make the draft. He declined saying his handwriting was not legible, and let the respondent's lawyer to do the draft. The applicant stated that he was not allowed to read the Agreement, but the respondent started that the Agreement was read out to the parties before each and his/her lawyer signed.

11. At the time of the application, the applicant had changed his lawyers.

12. It is notable that the respondent was working as a permanent way inspector in the [Particulars Withheld] Department of Kenya Railways Cooperation before he was retrenched. The respondent worked as a teacher. This is important because it is not easy to force such an enlightened person as the applicant into signing a document he has not read or understood. If, for any reason, he can be forced, his lawyer cannot be forced. That both he and the lawyer signed the Agreement tells me quite clearly that they had agreed to the contents of the same, which they had consciously negotiated and accepted to be bound by them. Had his lawyer sworn an affidavit, I find, he would have said that the Agreement was a mutually accepted arrangement on how the dispute between the parties was going to be resolved.

13. I have read and considered the written submissions by counsel for the parties. As to whether the Mediation Settlement Agreement was properly adopted by the court, **rule 14(2)** of the **Mediation (Pilot Project) Rules, 2015**, as read with **Clause 4:3**, of the **Judiciary Mediation Manual**, provide that upon receipt of the Mediation Settlement Agreement, the Deputy Registrar shall file it and place it before the Judge for adoption as a judgment or order of the Court. This is what happened in this case. The applicant may have written a letter of complaint. That was not an application, and there was nothing to stop the adoption of the Agreement. The proper thing was to file an application, like the present one.

14. Regarding the application, I bear in mind that a Mediation Settlement Agreement has to be treated, upon adoption, as a consent order. Such an order would only be set aside on grounds which would justify the setting aside of a contract **(Re Estate of B.M. (Deceased) [2019]eKLR).** In **Kenya Commercial Bank Ltd –v- Benjoh Amalgamated Ltd, Civil Appeal No. 276 of 1997,** the Court of Appeal stated that it is now settled law that a consent judgment or order had a contractual effect and can only be set aside on grounds which would justify the setting aside of a contract.

15. As to whether the grounds set out by the applicant meet the threshold for the setting aside of the said Mediation Settlement Agreement, I have noted in the foregoing that the parties were each represented, and each together with the lawyer signed the Agreement. It is not easy, under such circumstances, to allow a party to resile from such an agreement. The applicant complained that the process was hurried, and took only two sessions. A mediation may take one session. It may take several sessions. It depends on the complexity of the dispute, the willingness of the parties to settle and the ability and experience of the mediator. From the pleadings, it was common ground that each side had contributed to the acquisition and development of the property. In his own originating summons, the applicant stated that his contribution was equal to that of the respondent. At the end of the day, each party got 30% of the value of the property.

16. As to why the children benefitted from the Agreement, once again, the court has to accept what the parties settled on. It was the parties who agreed to give up some of their entitlement to their children.

17. I agree that courts will not be shy to interfere with or refuse to enforce a contract that is unconscionable, unfair or oppressive due to a procedural abuse during the formulation of the contract **(Margaret Njeri Muiruri –V- Bank of Baroda (Kenya) Ltd [2014]eKLR).** I, however, find that, from the foregoing, the applicant did not demonstrate that there was anything unconscionable, unfair or oppressive about the mediation that was conducted, or the Mediation Settlement Agreement that the parties arrived at.

18. I hope I have said enough to show that the applicant's notice of motion dated 3rd April 2019 lacks merits. The same is dismissed with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2022

A.O. MUCHELULE

JUDGE