



REPUBLIC OF KENYA



**Kivolonzi v Kariuki & another (Civil Suit 643 of 2015)  
[2022] KEHC 29 (KLR) (Commercial and Tax) (14 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 29 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 643 OF 2015  
A MABEYA, J  
JANUARY 14, 2022**

**BETWEEN**

**PETER KIVOLONZI ..... PLAINTIFF**

**AND**

**ALICE WANJIKU KARIUKI ..... 1<sup>ST</sup> DEFENDANT**

**NANCY RUGURU GITA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before Court is an application by the defendant/judgment- debtor dated 11/8/2020. It is brought under Order 21, Rule 51, 52, 59 and Order 40, 46 and 51 of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure Act](#).
2. The application had 7 prayers, 5 of which were spent and/or overtaken by events. The only remaining prayer is for the review of the orders made on 13/6/2018 by way of setting aside and/or expunging the Mediation Agreement adopted by the Court on 24/8/2018 and all subsequent orders thereto and refer the dispute to arbitration as provided for in the Sale Agreement which is the subject matter to this suit.
3. The application is supported by the affidavit sworn by the defendant on 11/8/2020. The grounds for the application are that the parties entered into a sale agreement whereby the plaintiff was to purchase 10 apartments in a development that was carried out by the defendant.
4. That a dispute from the said sale agreement arose between the parties leading to the filing of this suit. The Court referred the dispute to arbitration as the sale agreement stated that disputes ought to be before an arbitrator first.
5. The defendant contends that her Counsel made her believe that the dispute was referred to arbitration but instead it was submitted to a Mediator without giving her proper advice and obtaining instructions



from her. That she never gave consent either to the Court or through her Counsel for the submission of the matter to mediation before it commenced. Neither was she advised on the difference between arbitration and mediation. That she had a counterclaim of a substantial amount against the plaintiff which she had instructed her Counsel to submit to the arbitral tribunal but he did not do so.

6. It is for these reasons that the defendant prays that the consent be set aside and the dispute be heard by an arbitrator as provided for in the sale agreement.
7. The plaintiff opposed the application vide his replying affidavit he swore on 17/8/2020. He contends that the application has not satisfied the existence of any ingredients which would merit the setting aside of the consent order adopted by the Court on 24/8/2018. That the defendant was aware and fully participated in the Mediation. It would be a dangerous precedent for the Court to set aside a Mediation Agreement that was adopted as an order of the Court upon the matter being referred to Court Annexed Mediation and where it was entered into voluntarily only to have the parties change their minds and feign ignorance of facts well within their knowledge.
8. That the defendant had entered appearance and filed a defence in this suit thereby submitting to the jurisdiction of this Court. That she is precluded from pursuing the alleged counterclaim as the same is time barred by the Statute of Limitation Act.
9. I have considered the contentions and submissions of the respective parties. I have also considered the entire record. There are several undisputed facts in this matter. That the parties were engaged in an agreement that contained an arbitral clause; that a dispute arose and the plaintiff commenced this suit against the defendant; that the defendant entered appearance and returned a defence; that the matter was referred to Court Annexed Mediation on 14/2/2018 and a Mediator was appointed as per the Notice of Appointment of Mediator dated 16/3/2018 produced and marked as 'PK-1'.
10. Further, mediation was undertaken and a Mediation Settlement Agreement was entered on 26/4/2018. The same was signed by both parties and adopted as an order of the Court on 24/8/2018. It is clear that the parties jointly selected the Mediator as evidenced in the Notice of Appointment of Mediator dated 16/3/2018.
11. The jurisdiction of this Court on review is well known. An applicant must establish that there is an error on the face of the record; that there is discovery of new evidence which could not be procured at the time the order sought to be reviewed was made despite diligence and for any other sufficient reason.
12. In the application, it is not clear on what ground under the review jurisdiction the application is made. What is clear is that the defendant claims that she was not aware that the dispute was referred to mediation instead of arbitration as stipulated in the sale agreement.
13. The record shows that at all times in the proceedings, all the parties were represented by qualified Learned Counsel. The matter was referred to mediation and all the parties actively participated culminating with the consent order adopting the mediation agreement as an order of the Court.
14. In *Specialized Engineering Company Ltd v Kenya Commercial Bank Ltd* [1988] Eklr, it was held: -

“In my opinion, a civil suit can be compromised and that done, litigation insofar as the issues compromised are concerned, is at an end. The common law position is stated at page 403 paragraph 756 of vol 30 of Halsbury’s Laws of England 3rd Edn as follows: - ‘All or any of the questions in dispute in an action may be settled between the parties by compromise without trial, and if such compromise is bona fide and validly entered into, the Court does not allow the question so settled to be again litigated between the parties to the settlement.’”



15. In *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* [1980] eKLR, it was held: -

“Both counsel relied, for different purposes, upon the decision of the former Court of Appeal for East African in *Brook Bond Liebig (T) Ltd v Mallya* [1975] EA 266, where, in declining to set aside a consent judgment, the court cited with approval a passage from volume 1 of the 7th Edition of *Seton on Judgments and Orders* page 124 to the effect that, prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings 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 materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement”.

16. I reiterate the foregoing here. The mediation agreement was entered into in a bona-fide and valid manner and was later adopted by the Court. The defendant has not illustrated the existence of any grounds to warrant the setting aside of the consensual order.

17. Further, her application has been overtaken by events. Her property has already been sold in execution of the consent to a bona fide purchaser named Nancy Ruguru Gitau. By a ruling dated 3/5/2021, the deputy registrar ordered inter-alia that the defendant should handover the original title document to the property LR NO. 209/8336/138 LORESHO CRESCENT NAIROBI COUNTY. The deputy registrar also allowed the prayer to have the transfer instrument executed by the deputy registrar in the place of the defendant. I also note that this application to set aside the mediation agreement was filed on 11/8/2020, almost two years after the mediation agreement was entered into by the parties.

18. The upshot of the above is that the application is not made in good faith. It has no merit and is hereby dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JANUARY, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

