



**Kemei v Keino & another (Sued as Administrators of the Estate of the Late John Kiptoo Keino)
(Environment & Land Case E004 of 2022) [2023] KEELC 18957 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18957 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E004 OF 2022
MN MWANYALE, J
JULY 24, 2023**

BETWEEN

JOEL KIPLAGAT KEMEI APPLICANT

AND

ANNAH JELIMO KEINO 1ST RESPONDENT

EVERLYNE JEPCHIRCHIR 2ND RESPONDENT

**SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN KIPTOO
KEINO**

RULING

1. By a Notice of Motion dated March 14, 2023 the Applicant sought for Orders: -
 - i. Spent
 - ii. That the mediation settlement agreement report dated February 1, 2023 be reviewed, varied and/or set aside.
 - iii. That the costs of this application be provided for.
 - iv. That such other order be issued as the Honourable Court deems fit.
2. The application is premised on grounds outlawed on its face and supported by affidavit of Joel Kiplagat Kemei. According to the Applicant, the mediation agreement was obtained through concealment of material facts, misrepresentation as well as fraud. He alleged that he signed the report under the impression that it was an alternative list. That the contents of the report were not read out to the Applicant.



3. The 1st Respondent opposed the application vide a Replying Affidavit sworn by Annali Jelimo Keino on June 12, 2023. According to her the mediation process was conducted in compliance with the Court Annexed Mediation Rules. That the mediation agreement was willingly executed by all parties present.
4. On May 31, 2023, parties were directed to file written submissions in respect to application. Both sets of submission being on record the Court has taken into consideration.
5. It was the Applicants submissions, that the Mediation Settlement was ambiguous therefore incapable of being executed. Moreover, that the issues framed in the mediation agreement were crafted in full disregard to the mediation rules. In light of the above circumstances counsel for the Applicant prayed for setting aside of the mediation report to allow for fresh Applicant case, Counsel placed reliance on the decision in the Court of Appeal case of *Brooke Bond Liebig Vs Mallya* (1975 E. A. 266) where the Court held that “a consent judgment may be set aside in the event of fraud, collusion or any other reasons which would ordinarily cause setting aside of agreements.”
6. On their part, the Respondent submitted that the Applicant failed to demonstrate fraud, collusion, illegality, mistake, misrepresentation or that that agreement was against public policy. Counsel cited the decision of the Court of Appeal in the case of *Kenya Commercial Bank Limited vs Benjob Amalgamated Limited* Civil Appeal No 276/1997, where a similar position was stated.
7. It was also submitted that the Court had a duty to protect the Court Annexed Mediation and the role it played in resolution of matters and delivery of justice through Alternative Dispute Resolution as envisaged under Article 159 of the Constitution, and thus it was argued that the Courts dismisses the application.
8. I have considered the application affidavits and submissions by the parties. Under Rule 34 of the *Court Annexed Mediation Rules 2022*, there is a requirement of a settlement agreement to be adopted by the Court. Upon such adoption the settlement agreement is thus deemed as a consent order and/or judgment.
9. Similarly, the practice directions on proceedings in the Environment and Land Court on proceedings relating to the Environment and use and occupation of and title to land; Gazette Notice No. 5178/2014; provides under Rule 35 “where parties at any stage compromise a matter or intimate a settlement outside Court, they shall file consent filed by all parties in the matter settling the same. If no settlement is reached, the matter shall be set down for hearing. In all cases the filed consent shall require the approval and adoption by the Court.”
10. From the above provision, it is clear that there is a requirement that every consent including mediation agreement ought to be filed and adopted as an order of the Court.
11. Upon perusal of the record herein, it is evident that the mediation agreement in question was never adopted as an order or judgement of the Court. There is thus no judgment before this Court capable of being set aside.
12. It follows therefrom that this instant application was filed prematurely and it is hereby struck out with costs to Respondents.

DELIVERED AND DATED AT KAPSABET THIS 24TH DAY OF JULY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;



Ms. Jerobon holding brief for Mr. Lagat for Applicant

Ms. Kesei holding brief for Mwinamo for Respondent.

