



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 36 OF 2018 (OS)

GJM.....PLAINTIFF

VERSUS

FSC.....DEFENDANT

RULING

1. The plaintiff on 13th June 2018 filed this Originating Summons to say that he and the defendant were in 2008 married under the **Marriage Act** and cohabited until 2018 when the defendant left him. In the course of the marriage, it was pleaded, the parties contributed to the acquisition of the following properties:-

- a) Vehicle KBD [xxxx] Canter;
- b) Vehicle KBV [xxxx] Double Cabin;
- c) Vehicle KBD [xxxx] Pickup;
- d) Vehicle KBY [xxxx] Toyota Land Cruiser VXL;
- e) Plot near Kitui A.P. Line on which the matrimonial home is constructed;
- f) Plot No. [xxxx] and [xxxx] Kitui Municipality;
- g) Kalundu Plot No. [xxxx] units of residential houses fully let out;
- h) 4 stores; and
- i) Zaburi General Supplies business which trades in cereals.

A declaration was sought that the plaintiff was entitled to half share of all these properties. He claimed that this represented his contribution.

2. The defendant filed a replying affidavit on 24th September 2018 in which she denied that she was married to the plaintiff. Her case was that she was married to the late RC under the **African Christian Marriage and Divorce Act** on 10th August 1991 and that they got three children. On 8th June 2005 her husband died. She did not remarry the plaintiff, or at all. The plaintiff was her driver whom she paid. They had a casual sexual relationship which she terminated. She stated that the named property was hers, and that the plaintiff did not in any way contribute to its acquisition. She asked for the dismissal of the Originating Summons with costs.

3. The Deputy Registrar screened this file for mediation, and appointed Ms MM as the mediator. It is at this point that the defendant's advocates Kilukumi & Co. filed the present application.

4. The application seeks the orders that the directions issued on 4th February 2019 by the Mediation Deputy Registrar appointing M/s WM as mediator be set aside; there be a declaration that the **Practice Direction on Mediation** promulgated by the Chief Justice under **Gazette Notice No. 5214/2017** and **Gazette Notice No. 7263/2018** are *ultra vires* the provisions of **Section 59B (2) and (3)** of the **Civil Procedure**

Act; and that the two **Gazette Notices** be revoked, annulled and/or set aside.

5. The supporting affidavit was sworn by the defendant's advocate M/s Josephine Kyalo. Her case was that the unilateral appointment of the mediator by the Mediation Deputy Registrar as provided for under the **Practice Direction on Mediation** was *ultra vires* and in contravention of **Section 59B(2)** of the **Civil Procedure Act** as the parties to the dispute were not afforded the opportunity to select a mediator. She stated that under **Section 59B(3)** of the **Act** it was commanded that the mediation be conducted in accordance with the **Mediation (Pilot Project) Rules 2015**, and not under the **Practice Direction on Mediation** issued by the Chief Justice. It was her further case that the **Practice Direction on Mediation** offended **Section 31(b)** of the **Interpretation and General Provisions Act (Cap 2)** as the Chief Justice lacked jurisdiction, power and authority to revoke the legal notice issued by the Rules Committee promulgating the **Mediation (Pilot Project) Rules, 2015**. She contended that the power to amend, repeal or otherwise replace the **Mediation (Pilot Project) Rules, 2015** was expressly vested in the Rules Committee by dint of **Section 24(3)** of the **Statutory Declaration Act**. Counsel filed written submissions to amplify her case.

6. The plaintiff did not file a response to the application. His advocate Mr. Maina indicated, however, that he did not oppose the application.

7. **Section 59B (1), (2) and (3)** of the **Civil Procedure Act** provides as follows:-

“1) The court may-

(a) on request of the parties concerned;

(b) where it deems it appropriate to do so; or

(c) where the law so provides, direct that any dispute presented before it be referred to mediation.

2) Where a dispute is referred to mediation under Subsection (1), the parties shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.

3) A mediation under this part shall be conducted in accordance with the mediation rules.”

8. These provisions must be seen within the context of **Article 159(2)** of the **Constitution** which provides that when the courts and tribunals are exercising judicial authority they shall be guided by certain principles one of which is that:-

“a) ...

b) ...

c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted ...”

9. Before the Judiciary adopted mediation as one of the dispute resolution mechanisms, it conducted a pilot in the Family and Commercial Divisions of the High Court at Milimani. The pilot ran from April 2016 to July 2017 (the “Judiciary Mediation Manual” refers). This was made possible by the promulgation of the **Mediation (Pilot Project) Rules, 2015** made under the **Civil Procedure Act** on 4th April 2016 (**Legal Notice No. 197 of 9th October 2015**) by the Rules Committee. The pilot was to run for six (6) months subject to extension (**Legal Notice No. 1890 of 2016**). The period was extended for three months from 4th April 2017 through **Gazette Notice No. 3234 of 2017**.

10. It needs to be pointed out that the **Mediation (Pilot Project Rules, (Legal Notice No. 197 of 9th October 2015)** provided as follows:-

“In exercise of powers conferred by **Section 59A, 59B and 81 (2ff)** of the **Civil Procedure Act**, the Rules Committee makes the following rules:-

1) These Rules may be cited by the **Mediation (Pilot Project) Rules, 2015** and shall take place and subject for such period as the Chief Justice may direct.” (emphasis mine)

11. It was the Chief Justice who, through **Legal Notice No. 3234 of 2017**, extended the **Rules** by 3 months. At the end of the period, he issued **Practice Direction on Mediation** vide **Gazette Notice No. 5214** of 30th May 2017 (again to cover the two Divisions of the High Court at Milimani). The **Practice Direction on Mediation** was issued pursuant to the provisions of **Article 159** of the **Constitution** and **Sections 59B (1) (a), (b) and (c)** of the **Civil Procedure Act (2010)** in relation to mediation. What is material is that **Rule 17** of the **Practice Direction on Mediation** provides that:-

“This Practice Direction revokes **Gazette Notice No. 3234 of 2017** extending the applicability of the **Mediation (Pilot Project) Rules, 2015** gazetted in **Legal Notice No. 197.**”

12. The Rules Committee had in **Legal Notice No. 197** of 9th October 2015 indicated that it was the Chief Justice who was going to direct on when the **Rules** were going to take effect and for how long. This is how he extended the **Rules** (vide **Legal Notice No. 3234 of 2017**) for three (3) months. When the time was up he revoked the **Rules** and in their place he promulgated the **Practice Direction on Mediation**.

13. I have gone to this great length to show that the Rules Committee empowered the Chief Justice to determine when the **Mediation (Pilot Project) Rules, 2015** were going to be in effect, and for how long. He made that indication through the relevant **Gazette Notices** above. It is therefore not true that the Chief Justice usurped the powers of the Rules Committee when he gazetted the revocation of the **Mediation Rules (Pilot Project) Rules, 2015**.

14. Secondly, it needs to be clear that the **Rules** contemplated by **Section 59B(3)** of the **Civil Procedure Act** are not in place. The **Mediation (Pilot Project) Rules, 2015** were intended for the pilot period which came to an end. After the pilot period, the Judiciary rolled out mediation to courts beyond the Family and Commercial Divisions of the High Court at Milimani. To enable the roll-out, the Chief Justice promulgated the **Mediation Practice Direction on Mediation**, which was pursuant to **Section 59B (1) (a), (b) and (c)** of the **Civil Procedure Act**. The **Direction** makes no reference to **Section 95B (2)** that empowers the parties to the dispute to select a mediator.

15. Under **Rule 4** of the **Practice Direction on Mediation**, it is the Mediation Deputy Registrar who appoints a mediator, having given due consideration to the preference of the parties. The **Rule** has, however, a proviso that:-

“Provided that parties may by consent select any other mediator from the MAC register within seven (7) stipulated in paragraph 4(b) above.”

16. It follows that, even as the defence counsel complains that the mediator was imposed on her client, she was at liberty to consent to a mediator of her choice from the list kept by the Mediation Accreditation Committee. There is no indication that counsel sought to bring herself within the proviso but she was refused.

17. It is emphasised that the Constitution and the **Civil Procedure Act** command the courts and tribunals to encourage parties to arrive at an amicable settlement of their disputes without going through or completing a trial or appeal. The benefit of settlement by way of mediation is that it is accepted by the parties, it is expeditious and is final. When the court asks the parties to submit to mediation process, the parties have to attend the mediation sessions and to participate in the mediation process in good faith. However, they are not obliged to reach a settlement. Where there is no settlement, the matter shall go back to the court for a hearing date to be taken in the normal manner.

18. The question that one would ask the parties herein is this. What will they lose by going through this court annexed mediation that has a constitutional underpinning? Whether they will be mediated by Ms. MM or by another mediator, the maximum period of the process is sixty (60) days, and the judiciary will foot the expenses of the mediator. If there is no settlement, the matter shall go to trial.

19. Let me also mention that the **Mediation Practice Direction** seeks to fill a void. There are no rules governing mediation for the time being. Compared to rules, it is easier for the Chief Justice to promulgate a practice direction. As was appreciated by counsel for the defendant in the filed submissions, practice directions touch on the administration of justice; they are established for attaining justice with ease, certainty and dispatch (**University of Lagos & Another –vs- Aigoro [1984] NSCC 745** which was cited in **Bob Kephah Otieno –v- Ethics & Anti-Corruption Commission & 2 Others [2019]eKLR**). One hopes that counsel is not saying that until the Rules Committee has come up with mediation rules no mediation should be undertaken by the courts and tribunals.

20. I hope I have said enough to answer the concerns by counsel for the defendant. I find that the Mediation Deputy Registrar did not offend any law or rule when she appointed M/s MM to mediate in the dispute between the plaintiff and the defendant; the **Practice Direction on Mediation** promulgated by the Chief Justice under **Gazette Notice No. 5214/2017** and **Gazette Notice No. 7263/2018** are not *ultra vires* the provisions of **Section 59B(2) and 3** of the **Civil Procedure Act**; there is no legal basis to revoke, cancel or set aside the two Legal Notices; and, in promulgating the **Practice Direction on Mediation** the Chief Justice did not offend any provision of the **Interpretation and General Provisions Act** or the **Statutory Declarations Act**, and neither did he usurp the powers of the Rules Committee.

21. I dismiss the application. However, since the learned counsel was raising an issue of general public importance, I will not ask the defendant to pay costs.

DATED and DELIVERED at NAIROBI this 25TH day of JULY, 2019.

A.O. MUCHELULE

JUDGE