



REPUBLIC OF KENYA



KENYA LAW
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**Owuor v Ondiek (Environment and Land Appeal 80 of 2021)
[2023] KEELC 21028 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 80 OF 2021
E ASATI, J
OCTOBER 26, 2023**

BETWEEN

MARGRET ATIENO OWUOR APPELLANT

AND

AMOS ODHIAMBO ONDIEK RESPONDENT

(Being an appeal from Mediation Settlement and Ruling of the Chief Magistrate's Court at Kisumu by Hon. W.K. Onkunya delivered on 23rd April, 2021)

JUDGMENT

1. Vide the Memorandum of Appeal dated 30th November, 2021, the Appellant appealed against the Mediation Settlement Agreement and Ruling of Hon. W.K. Onkunya (SPM) delivered on 23rd April, 2021 in Kisumu El Case No.28 of 2020. The grounds of Appeal as set out in the Memorandum of Appeal were that;
 - a. the trial Magistrate grossly misdirected herself in adopting Mediation Settlement Agreement that was obtained through false, undue influence and misrepresentation.
 - b. the trial Magistrate did not in the alternative consider that the award is in conflict with Luo Culture.
 - c. the trial Magistrate erred by failing to note that the award was in disagreement with ethnic or integrity of the Luo Culture.
 - d. the learned Magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellant.
 - e. the trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.



The appellant prayed that the appeal be allowed with costs.

2. The background of the appeal is that the Appellant Margaret Atieno Owuor was the Defendant in Kisumu CMC E & L Case No.28 of 2020 (the suit) wherein vide the plaint dated 11th May, 2020, she had been sued by the Respondent over a land parcel known as Kisumu/Rata/1573(the suit land) for orders of eviction, special damages, interest and costs. The Respondent's case was that he was the registered owner of the suit land which he had developed with 2 residential houses, a shop, two (2) toilets and a bathroom.

That the Appellant entered the suit land on 5th January, 2013 and purported to establish a homestead therein, thereby hindering the Respondent's enjoyment thereof.

3. The record shows that after the close of the Plaintiff's (Respondent's) case, the dispute was vide court order dated 17th March, 2021 referred to Mediation at the instance of the Appellant. That the parties reached a Settlement Agreement dated 22nd April, 2021 which was, on 23rd April, 2021, adopted as a judgement of the court and the case marked as closed.

4. The terms of the Mediation Settlement Agreement were;

“We the undersigned parties to this action have agreed to settle our dispute/differences as follows:

1. That the dispute concerns the land Kisumu/Rata/1573.
2. That the parties agree that Margaret Atieno Owuor will vacate from the land Kisumu/Rata/1573 and relocated to Kisumu/Rata/1569.
3. That the parties agreed that the Plaintiff, Amos Odhiambo Ondiek will assist the Defendant Margaret Atieno Owuor to relocate to Kisumu/Rata/1569 by providing the service of a carpenter to move and build a new semi-permanent house in addition to providing the timber necessary for construction works.
4. That all parties have been made aware by the Mediator that this Mediation Settlement Agreement is binding and final. No appeal shall be allowed by the Honourable court.
5. That this Medication Agreement is voluntarily negotiated, concluded and signed by the parties to settle their dispute in an amicable and understanding manner.
6. That the present suit in court be and is hereby marked as fully settled.
7. That the Honourable court be pleased to adopt this Mediation Settlement Agreement.”

The agreement was signed by the parties and one Raphael Mwani a Mediator.

5. Aggrieved by the order of the trial court that adopted the Mediation Settlement Agreement as a judgement of the court, the appellant preferred this appeal.
6. Directions were taken on 1st February, 2023 that the appeal be argued by way of written submissions. Consequently, written submissions dated 4th May, 2023 were filed on behalf of the Appellant by the firm of Lugano & Achura Advocates. Counsel submitted that the trial court adopted the Medication



Settlement Agreement in spite of fervent protestation of the Appellant on its contents claiming that her consent had been obtained fraudulently. It was submitted that that was the reason for the appeal.

That the Mediation Settlement Agreement at paragraph 4 purported to oust the powers of the judicial system to look into both the substance and procedure of the agreement. That this is in contravention of Article 50 of *the Constitution* of Kenya which guarantees the right to be heard.

That the Appellant appended her thumbprint to the Mediation Settlement Agreement. That this means that her literacy is such that she could not have understood the contents and import of the Mediation Settlement Agreement.

Counsel relied on the case of Stephen Miheso –vs- Kaimosi Tea Estate Limited [2014] eKLR and Kenya Commercial Bank Ltd –vs- Specialized Engineering Company Ltd [1982] KLR 485 to support the submissions.

7. On whether the Mediation Settlement Agreement amounted to unjust enrichment by the Respondent, Counsel submitted that the Respondent knew when the Appellant was putting up structures including her house on the suit land. That it was therefore onerous and illegal for the Respondent to purport to want to take back the suit parcel of land from the Appellant.
8. On behalf of the Respondent, written submissions dated 22nd May, 2023 were filed by the firm of Ben Oduol Nyanga & Company Advocates. Counsel submitted that Rule 14(2) of the Mediation (Pilot Project) Rules 2015 as read with paragraph 12 of the Judiciary of Kenya Directions of Court Annexed Mediation (as amended in 2018) stipulated that upon receipt of the Mediation Settlement Agreement the Deputy Registrar shall file it and place it before a judge for adoption as a judgement or order of the court.
9. That a Mediation Settlement Agreement upon adoption has to be treated as consent order which can only be set aside on grounds that justify the setting aside of a contract. Counsel relied on the case of Re Estate of B.M. (Deceased) [2019] eKLR and Kenya Commercial Bank Ltd. –vs- Benja Amalgamated Limited, Civil Appeal No.267 of 1997 to submit that consent judgement or order had a contractual effect and can only be set aside on grounds which would justify the setting aside of a contract.
10. That the Applicant has not demonstrated that there was anything unconscionable, unfair or oppressive about the mediation that was conducted or the Mediation Settlement Agreement that the parties arrived at.

That the Appellant has not proved the requisite elements that it seeks to rely upon in order to vitiate the Mediation Settlement Agreement.
11. I have considered the record of appeal and the rival submissions herein. I note that the case was referred to mediation at the instance of the Appellant, that the Appellant participated in the mediation process and signed the resultant Mediation settlement Agreement by writing her name and thumbprinting on the same. I further note that the grounds of appeal upon which the Mediation Settlement Agreement is challenged have not been substantiated or proved. Court- Annexed Mediation is a form of Alternative Dispute Resolution whereby cases which are brought to court for litigation are referred to mediation for possible settlement. It is in with the Alternative Dispute Resolution Mechanisms recognized under Article 159 of *the Constitution* of Kenya 2010. An agreement arrived at from the Mediation is a settlement between the parties and is in the nature of a consent.
12. It has not been demonstrated to the required standard or at all how the Mediation Settlement Agreement was obtained by fraud or any other unlawful means or how the agreement was in contravention of Luo culture. I find that the trial Magistrate rightly did what she was expected by law to



do upon receipt of the Mediation Settlement Agreement that was duly signed by entering judgement in terms thereof.

13. I find that the appeal lacks merit. Appeal is dismissed. Since the parties are close family members, each party to bear own costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26TH DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant

No appearance for the Appellant.

Ochieng for the Respondent.

