



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 286 OF 2016

D. MANJI CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

FARMERS INDUSTRY LIMITED.....DEFENDANT

RULING

1. This suit was referred for mediation and parties were notified of that referral by a notice from the mediator dated **26th April 2017**. By that notice the mediator informed the parties of the consequence of failure to attend mediation as follows:

“You may be penalized if you fail to file a case summary or to attend the mediation session.”

2. Mediation session was fixed for **18th May 2017** but had to be adjourned at the request of the defendant’s learned advocate, **Mr. Mbaabu**.

3. On **8th June 2017** when mediation session was scheduled only the plaintiff’s advocate was present. The defendant’s advocate telephoned the mediator and stated that the defendant was unavailable.

4. Because of the failure of the defendant to avail its representative the matter was referred back to court.

5. On **2nd October 2017** at the parties request **Justice F. Ochieng** referred again the matter for mediation. It is important to state that the defendant was required, on **2nd October, 2017**, to show cause why its defence should not be struck out because the defendant had failed to comply with mediation.

6. A mediation session was scheduled for **22nd November 2017** when the advocate for the defendant telephoned the mediator and informed him that the defendant was unavailable. Mediation was rescheduled for **13th December 2017**. On this date **Mr. Mbaabu**, advocate of the defendant, telephoned the mediator and informed him that the defendant was not interested in mediation. In all the sessions for mediation the plaintiff was always represented.

7. As a consequence of the defendant’s failure to attend the mediation the defendant was requested by this court, to show cause why its defence should not be struck out.

8. The defendant filed an affidavit sworn by **Florence Wairimu Mbugua**. She described herself as the managing director of the defendant company. She stated she is 62 years old. That she suffers from diabetes, arthritis and hypertension. She gave the state of her health as the reason she failed to attend mediation sessions. To support her claim of ill health the deponent filed a letter written on **25th May 2018**. The letter is written by a doctor of the Kiambu Sub County Level V hospital. He stated:

25/05/2018

TO WHOM IT MAY CONCERN

Dear Sir/Madam,

RE: FLORENCE WAIRIMU MBUGUA 62 YEARS.

The above named person has been treated severally in our facility due to chest pains numbness and migraine.

On examination, we found that she has diabetes type 11.

On 5th August 2017 full blood analysis was done and she was diagnosed hypertension and bronchitis.

Since then, she has been attending MOPC clinic for follow up.

Any assistance given to her will be highly appreciated.

Yours faithfully

Dr. Njoroge.

9. The managing director of the defendant further stated that the defendant is interested in mediation since the defendant has a counter claim.

DETERMINATION

10. The defendant's managing director did not state that her ill health had hindered her from attending to her duties as managing director (M.D) of the defendant. The medical report did not state the M.D. suffers from arthritis. On the whole the court is not convinced that the M.D. was prevented to attend mediation sessions due to ill health. I believe what was told of the mediator by the defendant's advocate, on **13th December 2017**, had more of a ring of truth than anything else. That is that the defendant was not interested in attending mediation.

11. Since it is the finding of this court that the defendant deliberately refused to attend mediation The Practice Direction on Mediation in particular Direction No. 9. That Rule provides that where a party fails to comply with the mediator's directions or consistently fails to attend mediation sessions the court may either order parties attend further mediation sessions, or strike the non-complying parties pleadings, or order the defaulting party to pay costs to be assessed and determined by the court or make any other orders as the court deems fit.

12. The defendant has deliberately failed to cooperate with the mediator's instructions to attend mediation sessions. This is even after the court gave the defendant a second chance to attend mediation. The defendant was contumacious towards not only the orders of this court but the directions of the mediator.

13. In this courts view the defendant's defence and counter claim filed in court on **19th August 2016** should be struck cut with costs.

14. I therefore grant the following orders:

The defendant's defence and counter-claim filed in court on **19th August 2016** is hereby struck out with costs to the plaintiff because of the defendant's failure to comply with the mediators' direction.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this **29th** day of **November**, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE