



REPUBLIC OF KENYA



Yusuf & another v Karisa Banda Mwakilago aka Hamza Karisa Banda & another (Environment & Land Case E072 of 2022) [2025] KEELC 418 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEELC 418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E072 OF 2022
SM KIBUNJA, J
JANUARY 29, 2025**

BETWEEN

ISSA ABDALLA YUSUF 1ST PLAINTIFF

ASATBAI ISSA ABDALLA 2ND PLAINTIFF

AND

**KARISA BANDA MWAKILAGO AKA HAMZA KARISA
BANDA 1ST DEFENDANT**

LAND REGISTRAR MOMBASA 2ND DEFENDANT

RULING

[Notice of Motion Dated 16th July 2024]

1. The 1st defendant/applicant filed the application dated 16th July 2024, that is brought under sections 1A, 3A, 63 of *Civil Procedure Act*, chapter 21 of Laws of Kenya and Order 51 of the Civil Procedure Rules and Rule 29 of the Civil Procedure (Court Annexed Mediation) Rules 2022, seeking for:
 - a. Spent.
 - b. That the court to be pleased to strike out the Plaintiffs' pleadings for failing to comply with the Mediation process as directed by this court.
 - c. That costs of this application and the suit be borne by the Plaintiffs."

The application is based on the seven (7) grounds on its face and supported by the affidavit of Karisa Banda Mwakilago a.k.a Hamza Karisa Banda, deposing inter alia that the suit was referred to mediation but the plaintiffs/respondents have been reluctant to comply with the mediation process, including filing of their case summary and attending the mediation sessions arranged by the Mediator; that the Mediator has filed his report and a Certificate of Non-compliance in court, which has been taken in as



the court record; that as mediation is a court process, just like any other process, the court can sanction a party that deliberately frustrates its procedure, and should deal firmly with the Plaintiffs by having their pleadings struck out to protect the Mediation process; that mediation process is a court process that should be complied with, and is as important as a court hearing, where non-attendance can lead to a suit being dismissed.

2. On 16th September 2024, the counsel for the 1st defendant submitted that the application had been served but no replies had been filed or served. The counsel for the plaintiffs informed the court that they would be filing replies in two days. The court directed counsel to file and exchange submissions and fixed the matter for mention on the 4th November 2024. When the matter came up on 4th November 2024, the plaintiffs and their counsel were absent and no replies had been filed. The learned counsel for the 1st defendant had by then filed their submissions dated the 18th October 2024. I have checked the CTS today the 16th January 2025 and noted no replies or submissions have been filed by the plaintiffs.
3. The following are the issues for determinations by the court:
 - a. Whether the 1st defendant has met the threshold for the plaintiffs' pleadings to be struck out for failure to comply with the mediation process.
 - b. Who pays the costs?
4. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior court decision cited thereof, the record and come to the following determinations:
 - a. That the record confirms that the two suits were referred to mediation by consent of counsel for the parties on 9th October 2023. The court directed the matter to be mentioned before the Deputy Registrar on 18th October 2023.
 - b. The record further confirms that the matter was given reference Mediation Case No. MSA/MED/154/2023 that was presided by Robinson Ruwa Harr, mediator, and on 4th December 2023, he presented a Mediator's Report and a Certificate Of Non-compliance to the Court's Deputy Registrar, reporting that the parties have not settled because the Plaintiffs and their Advocate did not attend the meetings scheduled on 31st October 2023, 14th November 2023, 21st November 2023 and 29th November 2023. Further, that the Plaintiffs and/or their Advocate failed to submit a Case Summary despite reminders sent through emails, WhatsApp and text messages, and had failed to communicate as to when the Plaintiffs would be available for the mediation process.
 - c. Rule 28 (1) of the Court Annexed Mediation 2022 states that:

“ A party or the party's representative who fails to comply with any of the mediator's directions, consistently fails to attend mediation sessions or engages in deliberate misconduct may be cited for contempt of court and dealt with in the manner provided for under rule 29.”

Subrule 3 and 4 states that:

 - “ 3. If, after several attempts by the mediator to continue the mediation process forward, a party fails to comply, the mediator shall file a certificate of non-compliance in Form 11 as set out in the Schedule.



4. The Mediation Deputy Registrar or such other designated officer shall, upon the filing of the certificate of non-compliance, refer the file back to the trial court.”

Rule 29 provides that:

“Upon the referral of the file under rule 28(4), the court may—

- a. order the party in default to pay a penalty fee as the court may deem fit unless the party satisfies the court that there was a good cause for non-compliance;
- (b) strike out the pleadings of the non-complying party unless the party satisfies the court that there was a valid reason for non-compliance and that striking out the party’s pleadings would be inequitable in the circumstances; or
- (c) make any other order as the court deems fit, including an order that the parties conduct fresh mediation sessions a period to be specified in the order.”

Rule 30 (b) states that the mediation process shall come to an end upon the filing of a non-compliance report. It therefore means that the mediation process herein has come to an end. Having come to an end, and as submitted by the applicant, Rule 29 applies, and in particular, the applicants are therefore in order to seek for the court to strike out the plaintiffs’ pleadings for non-compliance.

- c. The defendants/applicants have demonstrated that the plaintiffs/respondents did not comply with the mediation process, as they never took part in it, despite being given adequate opportunity by the mediator. The mediator has provided a certificate of non-compliance on the part of the plaintiffs/respondents. The plaintiffs/respondents have not responded to this application despite being served and committing themselves to file a reply on 16th September 2024 in two days. The plaintiffs have failed to show cause why action should not be taken against them for failing to comply with the mediation process. In my view, the plaintiffs have deliberately failed to attend mediation sessions and even to file a response to this application, which served as a notice to show cause why their suit should not be struck out for non-compliance.
- d. From the mediation report, there were four sessions held, that is on 31st October 2023, 14th November 2023, 21st November 2023 and 29th November 2023 and it is undisputed that the plaintiffs failed to attend, and have not found it necessary to even attempt to tender an explanation before the court. The 1st defendant’s application therefore has merit.
- e. That pursuant to the provision of section 27 of *Civil Procedure Act* on costs, the plaintiffs will meet the 1st defendant’s costs.



5. In view of the above determinations, the court finds and orders as follows:

- a. That the 1st defendant's application dated the 16th July 2024 has merit and is hereby allowed with costs.
- b. That the plaintiffs' pleadings/suit herein are struck out for failure to comply with the mediation process.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF JANUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

1st Defendant/Applicant : Absent

Plaintiffs/Respondents : Absent

Other Defendants : Absent

Leakey – Court Assistant.

S. M. KIBUNJA J.

ELC MOMBASA.

