



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

African Orthodox Church of Kenya Registered Trustees & 4 others (Suing for and on behalf of The African Orthodox Church of Kenya) v Orthodox Archibishopric of Kenya and Irinoupolis & another (Environment & Land Case 525 of 2015) [2022] KEELC 3351 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3351 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 525 OF 2015

JO MBOYA, J

JULY 21, 2022

BETWEEN

AFRICAN ORTHODOX CHURCH OF KENYA REGISTERED TRUSTEES 1ST PLAINTIFF
NOCHOLAS MUKOMA GACHEGE 2ND PLAINTIFF
MOSES NGUGI GICHUHI 3RD PLAINTIFF
PETER NG'ANG'A MICHARA 4TH PLAINTIFF
FRED KAGO KABUCHI 5TH PLAINTIFF
SUING FOR AND ON BEHALF OF THE AFRICAN ORTHODOX CHURCH OF KENYA

AND

ORTHODOX ARCHIBISHOPRIC OF KENYA AND IRINOUPOLIS 1ST DEFENDANT
ORTHODOX TOWERS MANAGEMENT COMPANY LIMITED 2ND DEFENDANT

RULING

Introduction and Background:

1. The plaintiffs' herein filed and/or commenced the subject suit vide plaint dated the June 8, 2015, wherein same sought for various reliefs and/ or orders as against the defendants.



2. Following the filing and service of the subject plaint, the defendants duly entered appearance and thereafter filed a statement of defense dated September 3, 2015, but which was latter amended on December 15, 2015.
3. Be that as it may, the subject dispute was thereafter referred to mediation pursuant to the annexed courts mediation scheme, whereupon one Reverend Geoffrey K Njenga, was appointed as the mediator and tasked with the mandate to mediate the dispute between the disputants herein.
4. Following the appointment of the said mediator, same took up his mandate and held various meetings with the disputants herein, including the meeting that was held on the June 3, 2020, whereupon the disputants herein reached and/or arrived at an agreement whose terms were thereafter reduced into writing.
5. For convenience, it is appropriate to reproduce the terms of the agreement arrived at during the meeting held on June 3, 2020. Same are reproduced as hereunder;
 - a. The constitution of the church will be reviewed with a view to strengthening it to serve adequately the African Orthodox Church of Kenya.
 - b. The first draft of the reviewed constitution will be presented to the top leadership of the church within three months for ratification and adoption.
 - c. A committee of two, namely Bishop Kongai and Gibson Mburu (the committee) were appointed to work with the two lawyers on either side.
 - d. The committee will negotiate the fees for the two lawyers for this work.
 - e. It was agreed that all the properties of the church will be registered in the name of the African Orthodox Church of Kenya and find their rightful place within the constitution. This matter was left in the hands of the committee. The exercise will be concluded within three months and the report tabled in the meeting that will receive the report on the reviewed constitution.
 - f. Among the activities in placing the properties will be;
 - i. Identify all the properties of the church and all those in the name of the Company-Orthodox Archbishopric of Kenya and Irinoupolis.
 - ii. Identify the location of all properties of the church and company.
 - iii. Identify the current status of all these properties.
 - iv. Collect data of all the title documents.
 - v. Further, it is recommended that any property in the name of an individual belonging to the church be registered in the name of the church
 - g. It is recognized that if any person has spent money to secure that property a refund will be considered by the committee.
 - h. It was agreed that the legal fees be discussed by the committee. To effect this, the committee will negotiate with lawyers and then arrange to make payments as necessary. It is further agreed that any debt owed to any individual or groups will be recognized and forwarded to the committee for consideration.
 - i. Father Makarios Sr has intimated that there are debts to members of the church who have been following up the court cases which need to be considered by the committee.



- j. Father Mwangi has also intimated that he has suffered loss in his efforts to protect the church. This will be considered by the committee.
 - k. All the above debts will be forwarded to the committee to consider how best to repay them. The committee will give a proposal of debts and payments within one month on how debts will be repaid.
 - l. Finally, it is agreed that the church will file a report on the outcome of this process with the court when the final agreements are in place.
6. Following the signing of the mediation agreement, details which have been reproduced herein before, the appointed Mediator proceeded to and filed the mediation agreement, as well as a mediator's report dated July 5, 2020. For clarity, the mediator's report was duly received by the mediation registry on July 6, 2020.
 7. Suffice it to note, that upon the filing of the Mediators report, together with the mediation agreement, the advocates for the parties, were obliged to cause the report to be adopted in accordance with the mediation rules.
 8. Somehow, some kind of reservation arose on the part of learned counsel for the defendants. Consequently, instead of the mediation report being adopted, the advocates for the parties sought for directions of the court.

Directions of the Court:

9. Upon hearing arguments from the advocates for the parties, which were rendered on March 9, 2022, the court issued certain directions as hereunder;
 - a. The parties are at liberty to file and exchange whatever application that same may wish to file.
 - b. For the avoidance of doubt, the defendants counsel be and is hereby granted 14 days to file and serve the intended application.
 - c. Once filed and served, the plaintiffs' to respond to the application within 14 days from the date of service.
 - d. The said application/intended application shall be heard on May 23, 2022.
 - e. Costs shall be in the cause.
10. Come May 23, 2022, the defendants' advocate had not filed the intimated application, either within the stipulated timeline or at all.
11. Pursuant to and as a result of the failure to file the intimated application, the court in exercise of its jurisdiction under the provisions of section 59 B (3) & (4) of the *Civil Procedure Act*, chapter 21 laws of Kenya directed that the parties do file written submissions on the issue pertaining to the adoption on the mediation report as the judgment of the court.

Submissions By The Parties:

12. Following The orders and/or directions by the court that the parties do file and exchange written submissions on the need to adopt the mediation agreement or otherwise, both parties duly complied and filed their respective submissions.



13. For the avoidance of doubt, the two sets of written submissions are on record and same have been considered and taken into account.
14. Suffice it to point out that counsel for the plaintiffs submitted that the parties herein met under the guidance of the appointed mediator and thereafter reached and/or arrived at an agreement, wherein same duly compromised the dispute beforehand.
15. Further, learned counsel for the plaintiff submitted that the parties having arrived at a mutual agreement, whose terms were duly reduced into writing and thereafter signed by the parties, same were therefore bound by the terms of the agreement.
16. Based on the foregoing submissions, learned counsel for the plaintiffs implored the court to proceed and adopted the mediation agreement, which was filed in court on July 6, 2020, as the judgment of the court.
17. On behalf of the defendants, learned counsel submitted that though a mediation agreement was reached and or arrived at, the defendants are dissatisfied and same are keen to set aside the mediation agreement.
18. On the other hand, learned counsel also submitted that the defendants herein were in the process of filing an application for the setting aside of the mediation agreement and the mediators report.
19. Nevertheless, counsel for the defendants conceded that no such application has since been filed ever since the mediation agreement was filed and/or lodged with the court.
20. Be that as it may, counsel for the defendants' contended that the court ought not to adopt the mediation agreement.

Issues For Determination:

21. Having reviewed the mediation agreement arising out of the meeting held on June 3, 2020, the mediators report dated July 5, 2020; and having considered the submissions filed by and/or on behalf of the parties herein, the following issues arise and are therefore pertinent for determination;
 - a. Whether the mediation agreement arrived at and reduced into writing is binding on the parties.
 - b. Whether the court has any scintilla of jurisdiction to decline and or refuse to adopt the mediation agreement.

Analysis And Determination

Issue Number 1 - Whether The Mediation Agreement Arrived At And Reduced Into Writing Is Binding On The Parties

22. It is common ground that the parties herein agreed and/or covenanted to have the dispute at the foot of the subject suit to be referred to mediation pursuant to and in line with the court annexed mediation rules.
23. Following the agreement by the parties, the subject dispute was indeed referred to mediation and one Reverend Geoffrey K Njenga, was duly appointed and was constituted as the mediator.
24. Subsequently, the appointed mediator engaged the parties herein and thereafter the parties vide a meeting held on June 3, 2020 reached an agreement/settlement, whose terms were thereafter reduced into writing and executed by the representatives of the parties.



25. It is imperative to state that the agreement under reference contains express and explicit terms, which are devoid of any ambiguity or otherwise. for clarity, the terms of the agreement are expressive of the clear intentions expressed by the disputants.
26. Having reached and/or arrived at the agreement, the mediator, thereafter forwarded agreement to court and emphasized that the parties have indeed reached an agreement.
27. To my mind, the parties herein having freely and voluntarily express their intention and thereafter reduced same into writing, the parties must be taken to have meant everything that was reduced into writing and which was duly signed by their authorized representatives.
28. Further, it is imperative to underscore that whenever two or more Parties agree on terms, which terms are thereafter reduced into writing and signed by the concerned parties, it must be taken that those parties have agreed to be bound by the terms of the deed/agreement.
29. In respect to the subject matter, the parties having agreed on various terms, which were thereafter reduced into writing, same are therefore bound by the resultant contract, duly executed and signed by the parties' authorized representatives.
30. Consequently, neither of the parties herein can now be heard to renege and/ or resile from the terms of the agreement/contract.
31. Nevertheless, it is the duty of the court to enforce the terms of the contract and/or agreement arrived at by the parties and whose terms are clear, explicit and devoid of ambiguity.
32. In any event, the court has no mandate to vary and/or re-write the terms of the contract, save for limited exceptions, where it is established and proven that the contract in question was procured by fraud, misrepresentation, coercion, undue influence and/or is otherwise contrary to public policy.
33. Other than the limited exceptions, which have been alluded to in the preceding paragraph, it is my observation that the parties, in this case, the plaintiffs and the defendants are bound by the terms of the mediation agreement, which was brokered by a duly appointed court mediator and who, similarly, was a man of God.
34. As concerns the established principles pertaining to and/or concerning interpretation and/or construction of deeds, contracts and/or agreements reduced into writing, it is appropriate to state that the law requires that such deeds/agreements be construed from the express terms contained therein, without reliance of any extrinsic/extraneous factors and/or circumstances.
35. Simply put, extrinsic and extraneous evidence, irrespective of their nature, are generally excluded in the construction of deeds, contracts and/or agreements.
36. To vindicate the observation, it is appropriate to take cognizance of the holding in the case of the *Speaker Kisii County Asembly v James Omariba Nyaoga* (Court of Appeal at Kisumu) [2015] eKLR, where the Honourable Court observed as hereunder;

“The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of sections 97 and 98 of the *Evidence Act*, chapter 80 laws of Kenya, which attempt we must reject. This is not the first time we are doing so. In the case of *John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda* [Kisumu Civil Appeal No 217



of 2003] (UR), we cited, with approval, Halsbury's Laws of England 4th Edition vol 12, on interpretation of deeds and non-Testamentary Instruments paragraph, 1478 as follows:-

"Extrinsic evidence generally excluded: Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

37. Other than the foregoing decision, it is also appropriate to also underscore the succinct observation by the Court of Appeal in the case of *Prudential Assurance Company of Kenya Ltd v Jutley & another* [2005] eKLR, where the court cited the following passage from *Odger's Construction of Deeds and Statutes* (5th Edn) at p 106 thus:

"It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence".

In Halsbury's Laws of England (4th Edn) vol 9 (1) at para 622, it is further stated as follows in respect of the rule:

"Where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms".

38. Premised on the foregoing, it is my finding and holding that the parties herein having willingly, freely and voluntarily entered into an agreement and whose terms are devoid of any ambiguity, same are duly bound.
39. In any event, it is also appropriate to state that having entered into the mediation agreement under reference, the parties must be prepared to live with the terms and/or consequences, if any, arising therefrom.

Issue Number 2 - Whether The Court Has Any Scintilla Of Jurisdiction To Decline And Or Refuse To Adopt The Mediation Agreement

40. It is imperative to recall that on March 8, 2022, counsel for the defendants intimated to the court that same was keen to file and/or mount an application to set aside the mediation agreement, entered into and duly executed by the parties.
41. Pursuant to the intimation by counsel for the defendants, the court proceeded to and granted liberty to the counsel to proceed and file the intended application. For clarity, the court proceeded to and circumscribed the duration within which the intended application was to be filed.
42. Nevertheless, despite the latitude granted, no such application was filed and/or lodged with court. For the avoidance of doubt, none has been lodged even to date, namely, the date of the crafting of the subject ruling.



43. Be that as it may, assuming that the application was lodged, the question that would have arisen is whether the court has any jurisdiction to set aside and/or vary a mediation agreement that is entered into by the parties and which is not contrary to public policy.
44. To my mind, it is imperative to appreciate that there is a clear dichotomy between mediation and arbitration.
45. Whereas an award rendered and/or given out vide an arbitration, is capable of being set aside and/or varied, subject to proof of certain laid down grounds, the converse applies in respect of mediation awards.
46. Suffice it to note that mediation is a voluntary, informal, consensual and strictly confidential process where a neutral third party helps the disputants to reach a negotiable solution. For clarity, mediation is not adversarial and the role of the mediator is to encourage and facilitate the resolution of a dispute between the disputing parties.
47. Based on the foregoing, it is therefore imperative to state and underscore that where an agreement is reached and/or arrived at to between the parties such an agreement has binding and contractual effects.
48. At any rate, it is also important to underscore that upon the filing of a mediation agreement, the jurisdiction of the court is circumscribed and underlined vide the provisions of sections 59 B (4) & (5) of the *Civil Procedure Act*, chapter 21, laws of Kenya.
49. For convenience, it is appropriate to reproduce the said sections and same is reproduced as hereunder;
 - 4 An agreement between the parties to a dispute as a result of a process of mediation under this part shall be recorded in writing and registered with the court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that court.
 5. No appeal shall lie against an agreement referred to in subsection (4).
50. In my considered, the mandate of the court before whom a mediation agreement has been filed is circumscribed and limited under the law. For clarity, the court is obliged to adopt, ratify and enforce the terms of the mediation agreement.
51. Perhaps, it is also important to point out for the parties herein and for posterity, that the mediation process and the resultant agreements arising therefore, are not amenable to the setting aside process prescribed vide the provisions of order 46 of the Civil procedure Rules, 2010. For clarity, the application for setting aside of awards thereunder relate to awards by the an arbitrator/umpire, as prescribed thereunder and not otherwise.
52. Consequently, I am afraid that even if counsel for the defendant had filed the intimated application, (which was not filed anyway), same would have been premature, misconceived and still-borne.
53. In a nutshell, I find and hold that the mediation agreement duly lodged with court on July 5, 2020, was clear, explicit and therefore enforceable, in line and/or in accordance with the provisions of section 59 B(4) of the *Civil Procedure Act*, chapter 21 laws of Kenya.

Final Disposition:

54. Having addressed and/or considered the two pertinent issues, which were outlined in the body of the ruling herein, i come to the conclusion that the court herein as a limited mandate and/or jurisdiction once a mediation agreement is duly filed.



55. Based on the foregoing, the orders that commend themselves to me are as hereunder;

- i. The mediation agreement arising from the meeting of June 3, 2020 and which was duly signed by the parties/ representatives thereof be and is hereby adopted as the judgment of the court.
- ii. The suit herein be and hereby marked as fully settled and/ or compromised in terms of the mediation agreement.
- iii. Each party shall bear own costs.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2022.

OGUTTU MBOYA,

JUDGE,

In the presence of

Kevin Court Assistant

Mr. Arthur Ingutia for the Plaintiffs

Ms. Christine Githii for the Defendants

