



**Ngari v Kariru (Environment & Land Case 28 of 2014)
[2022] KEELC 13369 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 28 OF 2014
JO OLOLA, J
SEPTEMBER 28, 2022**

BETWEEN

PETER KARURI NGARI PLAINTIFF

AND

PETER IRUNGU KARIRU DEFENDANT

RULING

1. By the Notice of Motion dated 10th November 2020, Peter Irungu Kariru (the Defendant) urges the Court to be pleased to set aside the mediation settlement agreement entered on 5th August 2020 plus all the consequential orders and thereafter proceed to hear the suit.
2. The application is supported by a short affidavit wherein the Defendant deposes as follows at Paragraphs 2 to 12:
 - “2. That this matter was referred to Mediation by the Court of its own motion and allocated to one Rose Wanjiku Muturi;
 3. That on 5th August, 2020 the Plaintiff and I appeared before the said Mediator;
 4. That the proceedings before the Mediator turned out to be intimidations on me from the Mediator and the Plaintiff;
 5. That I was only asked how much I had spent on the land and that is what was written down (annexed hereto and marked PIK 1 is a copy of the said agreement);
 6. That my attempts to explain and expound on the issued surrounding this case were not entertained by the mediator;



7. That mediator kept telling me that I could even be jailed for constructing on the said land which made me scared and had to give in to her intentions;
 8. That I have developed this land and constructed a permanent house on it in which I reside;
 9. That telling me to pull down my house and vacate would be the highest level of impunity on the part of the Mediator and abuse of the justice system;
 10. That the said agreement is thus not a reflection of my free will and should be ignored by the Court;
 11. That I should not be made to suffer unfairly; and
 12. That it is in the interest of justice that the application be granted to allow for the Court to determine the matter on the evidence.”
3. The Plaintiff – Peter Karuri Ngari is opposed to the application. In a Replying Affidavit sworn on 26th July, 2021 and filed herein on 3rd August 2021, the Plaintiffs avers as follows at Paragraphs 5 to 11 thereof;

- “5. That I and the Defendant/Applicant reached a settlement and voluntarily executed a mediation settlement agreement dated 5th August, 2020 disposing off the dispute. Annexed hereto is a copy of the said agreement marked “PKN 1”;
6. That I am informed by my Advocate on record which information I verily believe to be true that the agreement is enforceable in the same manner as any other written contract and the Defendant/Applicant having reached a settlement agreement disposing of the dispute through mediation cannot unilaterally repudiate the agreement;
7. That the proceedings before the mediation was free of intimidation and we voluntarily agreed on the agreement;
8. That I have even settled the terms of the mediation agreement by paying the Defenant/Applicant Kshs.400,000/- (Kenya shillings Four Hundred Thousand only) as directed. Annexed hereto are copies of receipts marked as “PKN 2(a) and (b)” respectively;
9. That I am informed by my advocate on reord, which information I verily believe to be true that it is imperative that in order to effect the purpose of mediation, mediation settlement agreement should be treated with the same sanctity and dignity that is accorded other contracts which are freely negotiated and as such, the Defendant/Applicant is duty bound to honour the agreement;
10. That the Defendant/Applicant other than mere allegation has failed to demonstrate that:-
 - (i) That there was a wrongful or improper threats such as a criminal or tortious conduct in reaching at the mediation agreement;



- (ii) That the threat actually induced the making of the contract, and that I improperly took advantage and or caused financial distress; and

11. That the Defendant/Applicant has failed to establish the existence of the above ingredients as such, his application is an afterthought, unmeritorious and should be dismissed with costs.”

4. I have carefully perused and considered the Defendant’s application and the response thereto by the Plaintiff. I have similarly perused and considered the oral submissions made before me by the Learned Advocates representing the two parties.

5. The Defendant herein prays for an order setting aside the mediation settlement agreement entered between himself and the Plaintiff on 5th August, 2020 and that thereafter this suit be heard and determined by the Court. The Plaintiff is opposed to that application.

6. The guiding principles used by Courts in setting aside consent judgments or orders are well established. In *Flora N. Wasike -vs- Destimo Wamboko* (1988) eKLR: Hancox J.A (as he then was) stated thus:

“It is now settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or certain conditions remained to be fulfilled which are not carried out.”

7. In *Kenya Commercial Bank Limited -vs- Specialized Engineering Company Limited* (1982) KLR, 485, it was held that an order entered into by consent is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, or collusion, or by an agreement contrary to the policy of the court, or where the consent was given without sufficient material facts, or in misrepresentation or ignorance of such facts or in general for a reason which would enable the Court to set aside an agreement. At Page 493 of the said decision, Harris J. opined thus:

“The marking by a Court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their Advocates, and when made, personally, and the made, such an order is not lightly to be set aside or varied save by consent or on one or other of the recognised grounds.”

8. In the matter herein, the Defendant disputes the Mediation Settlement Agreement dated 5th August, 2020 on the grounds that the same was arrived at through threats and intimidation on the part of the mediator. At Paragraph 7 of the Supporting Affidavit, the Defendant in particular accuses the mediator of repeatedly telling him that he could go to jail for having constructed a house on the suit land and that it is on that account that he gave in to the Mediator’s intentions and signed the agreement.

9. While those allegations of threats and intimidation have been denied by the Plaintiff, I did not think in the circumstances herein that the same could be dismissed so lightly. From the record herein, it is apparent that the Plaintiff filed this suit on 24th February, 2014 seeking an order of a permanent injunction to restrain the Defendant from entering, demolishing structures, erecting any new structures or in any other way trespassing or interfering with the Plaintiff’s quite possession over land parcel No. Mahito/Gaturia/1716.

10. Those prayers arise from the Plaintiff’s contention that he had sold a portion of the suit property to the Defendant on 14th November, 2013 at a consideration of Kshs.240,000/-. It is the Plaintiff’s case



that the Defendant only paid a sum of Kshs.190,000/- on execution of the Agreement but had since failed to complete payment of the purchase price.

11. In his Statement of Defence dated 2nd May, 2014 the Defendant denies the Plaintiff's contention and asserts that the balance was payable upon the Plaintiff and the Defendant attending the Land Control Board for its consent to transfer. The Defendant avers that he is ready and willing to pay the balance but the Plaintiff has never informed him of any sitting of the Land Control Board.
12. That Statement of Defence was drawn and filed on behalf of the Defendant by Messrs M.C Kamwenji & Company Advocates who remain on the record to-date. While the parties somehow appeared for mediation in person before the Mediator on 5th August 2020, it was not clear to me from a perusal of the Court record how the matter ended up before the Mediator. I say so because there is nowhere on record where the Advocates on record appeared in Court and when the matter was formally referred to Mediation.
13. It is also apparent that the parties appeared before the Mediator once on the said 5th day of August, 2020 when the Mediation Settlement Agreement was said to have been arrived at. That agreement requires the Defendant to vacate the suit land and it was clear in the circumstances herein that it was arrived at without giving the Defendant a chance to properly consider the same and or consult thereon with his advocate on record.
14. It is clear that once the Defendant consulted with his Advocate he filed the present application. As it were the application was filed before the Mediation Settlement Agreement could be adopted as an order of this Court. Given the circumstances enumerated herein above, I am satisfied that this is a matter in which the Court ought to invoke its inherent powers to revoke the Mediation Settlement Agreement.
15. It follows that I am satisfied that there is merit in the Motion dated 10th November, 2021. I allow the same, set aside the Mediation Settlement Agreement dated 5th August, 2020 and hereby direct that the suit herein proceeds to hearing in the usual manner.
16. The costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Ms Maina holding brief for Mwaura for the Plaintiff

No appearance for the Defendant

Court assistance - Kendi

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J. O. Olola

JUDGE

