



**Ngugi v Mwangi & another (Environment & Land Case
246 of 2021) [2024] KEELC 538 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 246 OF 2021
LL NAIKUNI, J
FEBRUARY 5, 2024**

BETWEEN

MARGARET WAMBUI NGUGI PLAINTIFF

AND

DAVE MUNYA MWANGI 1ST DEFENDANT

PHYLIS WANJIKU MWANGI 2ND DEFENDANT

RULING

I. Introduction

1. The Honorable Court has been moved by Margaret Wambui Ngugi – the Plaintiff/Applicant herein to make a determination from a filed Notice of Motion application dated 16th January, 2023. The application was instituted against the 1st and 2nd Defendants/Respondents herein. It was brought under the Certificate of urgency by the dint of the provisions of Sections 1A and 3A of the *Civil Procedure Act* Cap. 21 Order 50 Rule 6 of the *Civil Procedure Rules* 2010.
2. Upon service being effected, the 1st and 2nd Defendants/Respondents while opposing the application filed their 11 paragraphed Replying Affidavit. The court will be dealing with the contents later on in this Ruling.
3. On 19th January, 2024 the Honorable Court certified the application as urgent and listed it for inter parte on 1st February, 2024 the Honorable Court delivered to make a Ruling on 5th February, 2023.

II. The Plaintiff/Applicants Case

4. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.



- b. That the Court be pleased to give the Plaintiff/Applicant an extension of time to clear the amount due to the Defendants/Respondents pursuant to the settlement agreement adopted by this court.
 - c. That the costs of this applications be provided for.
5. The application was based on the grounds, testimonial, facts and the averments made out under the 14 Paragraphed Affidavit of Margaret Wambui Ngugi sworn and dated on 16th January, 2024 and the six (6) annexures marked as “MWN - 1 to 6” annexed thereto. She averred as follows: -
- a. She was the Plaintiff/Applicant herein and hence competent and duly authorized to swear this Affidavit.
 - b. Pursuant to this court’s directions the parties annexed mediation and eventually reached a settlement agreement and all signed it.
 - c. According to the terms of the settlement agreement, the Defendant was to pay a total sum of Kenya Shillings Thirty-Three Million (Kshs. 33,000,000/=) within 30 days from the date of the adoption of the settlement agreement.
 - d. The said settlement was adopted by court on 19th October, 2023.
 - e. She had not been able to pay the said amount to the Defendants as after the signing, she and her family started efforts to raise the money which had been very difficult due to the prevailing economic situation in the county and particularly over the December, holidays period.
 - f. She had put up two of their properties for sale – being property in Eastleigh – Land Registration No. 209/260/9 and another in Kilgoris – Land Reference No. Transmara/ Kimintet D” 823. For the Eastleigh property they had received some offers which were not good enough. However, they had managed to get a buyer for the one for Kilgoris. The purchaser had paid a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) and the balance to be paid after the vendor and purchaser visit the property to verify and mark the boundaries with the assistance of the District Surveyor Kilgoris.
 - g. Her husband deposited the sum of Kenya Shillings Thirteen Million (Kshs. 13,000,000/=) into the account of Messrs. Wanjiru Thungu & Company Advocates and was about to deposit a further sum of Kshs. 2,000,000/= when the said Advocate returned the money and wrote to the Deponents Advocate via Email letter dated 15th January, 2024.
 - h. She intended to clear money and requesting court for an extension of time for payment of the settlement upto 15th February, 2024.

III. The Replying Affidavit by the 1st and 2nd Defendants/Respondents

6. While opposing the application dated 16th January, 2024, the 1st and 2nd Defendants/Respondents filed their 11 Paragraphed Supporting Affidavit sworn by Dave Munya Mwangi and dated 23rd January, 2024. He averred as follows:-
- a. He was one of the Defendants herein duly authorized by the 2nd Defendant to swear this affidavit hence competent to do so on her behalf and on my behalf and respond to the Plaintiff’s application dated 16th January, 2024 thus.
 - b. The Plaintiff’s application was a waste of court’s time, malicious and intended to deny the Defendants the proceeds of the sale of the suit property herein.



- c. The parties negotiated this suit out of court and a settlement agreed was arrived at, the same was recorded in court as an order of the court. The said orders were still valid as the same have not been vacated and or set aside and as such the Plaintiff is bound to comply with the orders issued by this honourable court.
- d. Further the Plaintiff's current application was aimed at delaying payment of the settlement sum, the sum of Kenya Shillings Thirty Three Million (Kshs. 33, 000, 000.00/-) which she willingly agreed to and the terms of payments were therein stated, the Plaintiff never not raised any issue of challenges in payment of the settlement sum and the allegations herein was in bad faith as nothing stopped her from requesting for more time to pay during the negotiations period if at all she had any economic challenges as she claims.
- e. The 'prevailing economic situation' that the Plaintiff was alluding to never just cropped in when the payment of the settlement sum had become due, the situation was a creation by the Plaintiff to delay paying the Defendant and in any event, the Plaintiff had delayed completion of the sale transaction for over 7 seven years with the same excuses that they were trying to dispose off their property to pay, there was nothing new in the Plaintiff's application only delaying tactics.
- f. The Plaintiff's application had not been made in good faith as the same was only filed after the Defendants demanded payment of the settlement sum via our advocate's email of 11th January, 2024 and the Plaintiff had not previously approached the Defendant intimating any challenges in payment and or requesting for extension of time, this orders sought herein are undeserving and in the interest of justice and all fairness, the same should be struck out of the courts record, the suit herein had been marked as closed and no order had been made to reopen a closed suit.
- g. The Defendants complied fully with the terms of the settlement agreement and forwarded all the completion documents provided therein and it would be extremely unfair to the Defendants for the Plaintiff to continue delaying payment of the sale proceeds every time the same became due for payment. The Plaintiff's action had proved that she had never been ready and willing nor able to complete the sale transaction herein. He had suffered as a vendor in the hands of the Plaintiff for the delay in paying the balance of the purchase price. He sought for Court's protection to ensure full compliance of the court orders on the full payment sum .
- h. Consequently, he prayed that the application herein be dismissed so it could -pave way for him to exercise his rights as a vendor. He urged the court to disallow the Plaintiff's application.

IV. Analysis and determination.

7. I have considered and read through the Notice of Motion application dated 16th January, 2024 the responses by the 1st and 2nd Defendants, the provisions of the *Constitution* of Kenya 2010 and the statutes. For the court to reach an informed and fair decision on the subject matter, it has crystalized the same into 3 issues for its determination: -
 - a. Whether the Notice of Motion application dated 16th January, 2024 by the Plaintiff/Applicant has any merit.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who will bear the costs of the application?



Issue No. (a) Whether the Notice of Motion application dated 16th January, 2024 by the Plaintiff/Applicant has any merit.

8. The Honorable Courts decipher that there two (2) subtractions herein being firstly the existence validity of a consent order and secondly the extension of the terms and conditions of the consent order. To begin with there is no dispute that the parties in this matter were on 20th June, 2023 referred to the Court annexed mediation for the out of court settlement of the matter. Indeed, the process was so successful which culminated into the parties duly executing a Settlement Agreement and the same was to set aside, discharge and/or vary the said orders. I fully concur with the Learned Counsel for the 1st and 2nd Defendants this has not happened so far. This position was upheld in the famous case of “[Flora N. Wasike v Destimo Wamboko](#) (1988) eKLR and “[Brooke Bond Liebig Limited v Mallya](#) (1975) EA 266 at 269 Law Ag O said:-

“A Court cannot interfere with a consent Judgements except in such a circumstances as would afford good ground for varying or rescinding a contract between the parties.....” While in the *Kenya Commercial Bank Limited v Specialised Engineering Co. Limited* (1982) KLR 485” Harris J held inter alia:-

“A consent order entered into by the Counsel is binding on all parties to all 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 or where the consent was given without sufficient material facts or is misapprehension or ignorance of such facts in general for a reason which would be the Court to set aside an agreement”

9. Certainly, the matter from the instant case is not about the variation or setting aside nor discharging the Consent order. Far from it. Indeed, all the parties here have upheld the dignity, fidelity and integrity of the already duly executed Consent order terms and conditions stipulated thereof as adopted by Court herein. Clearly, the Plaintiff/Applicant has sought to be granted an extension or enlargement of time to be in position to fully adhere with the Consent order. The Plaintiff/Applicant needs to be accorded space to make efforts towards settling the terms of the agreement having encountered spelt out economic difficulties prevailing in the Country particularly during the December festivities. Secondly, the applicant seeks for extension of time to be in a position to comply with the Court Order. The Applicant holds that they have had difficulties in raising the money due to the economic difficulties prevailing in the country particularly during the month of December 2023. To demonstrate effort, the Applicant put her property for sale and from the proceeds acting in good faith they deposited a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) into the Defendant’s account but who decided to return the monies holding that: -

“Kindly note that our client’s instructions are not to receive any partial payment as stated in your email of 11th January, 2023. In the circumstances therefore I have instructed our bankers Family Bank Ltd. to refund back the Kshs. 13M deposited to our clients account by your client”

I find the assertion from this correspondence by the Learned Counsel for the 1st and 2nd Defendant are rather unfortunate, harsh and un-accommodative. In saying so, I am informed by the English saying goes “a bird in hand is worth two in the bush”. Ideally, the Advocate should have received the money and press for the balance.



By receiving the money did not in any way imply compromising the terms of the agreement.

10. Further, the Applicant has been able to demonstrate their level of commitment in settling the debt. They have disclosed the efforts made for the sale of the family property and attached empirical documentary proof in terms of sale agreement and so forth. This court is persuaded that indeed the Applicant has resilience commitment and/or dedication. Their only problem is the limitation of time. They have offered to have finalized by 15th February, 2024 which to me is extremely realistic. The law under the provisions of Section 95 of *Civil Procedure Act* Cap 21 holds that:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act the court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may have expired”

This same legal position is founded under the Provisions of Order 50 Rules 6 and 7 of the *Civil Procedure Rules* 2010. Hence, I hold the Plaintiff/Applicant has valid and justification for the prayer sought.

Issue No. (c) Who will bear the costs of the application?

11. It is now well established that issues of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceeding in a litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result and outcome of the legal action afore stated.
12. However, in the instant case, although the application by the Plaintiff/Applicant herein has been successful, but its imperative and reasonable that each party bears their own costs as it's a matter where parties have been sustaining healthy, cordial and mutual understanding and relationship in attempt to settle the dispute. It is on record they willingly and with great co – operation subjected themselves to a Court annexed mediation. The Honourable Court should not be seen to intermeddling on this spirit by imposing costs. therefore it would be fair that each party bears their own costs.

V. Conclusion & Findings

13. In conclusion, having stated the above the Honorable Court proceeds to make the following orders:-
- a. That the Notice of Motion application dated 16th January, 2024 by the Plaintiff/Applicant has merit and hence it be allowed accordingly.
 - b. That the Plaintiff/Applicant be granted an extension of:-
 - i. Upto 9th February, 2024 to deposit the sum of Kenya Shillings Thirteen Million (Kshs. 13, 000, 000/=) into the bank account of the Advocate for the 1st and 2nd Defendants.
 - ii. Upto 29th February, 2024 to have settled the amount of Kenya Shillings Twenty Million (Kshs. 20, 000, 000.00/=) and other related costs as per the Court Consent order on or before 29th February, 2024.
 - c. That failure to comply with the consent order dated 19th October, 2023 and the orders herein the 1st and 2nd Defendants to be at liberty to proceed on with the execution accordingly.
 - d. That each party to bear their own costs.

It is so ordered accordingly.



RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF FEBRUARY 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant;
- b. No appearance for the Plaintiff/Applicant.
- c. M/s. Thungu Advocate for the Defendant/Respondent

