



REPUBLIC OF KENYA



Mumanyi & another v Mokaya & another (Environment & Land Case 54 of 2007) [2024] KEELC 6719 (KLR) (7 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 54 OF 2007**

MD MWANGI, J

OCTOBER 7, 2024

BETWEEN

CHARLES OCHANDA MUMANYI 1ST PLAINTIFF

MARY MORAA NYAOSA MUMANYI 2ND PLAINTIFF

AND

BRUCE MOKAYA 1ST DEFENDANT

PAMELA MOKAYA 2ND DEFENDANT

RULING

(In regard to the Plaintiffs' Application dated 13th December, 2023)

Background

1. This Ruling is in respect of the Plaintiffs' Notice of Motion application dated December 13, 2023. The application is expressed to be brought under the provisions of Articles 19 (3), 20 (1) (2) (3) & (4), 50 (1) & 159(2) (c) of the *Constitution*, Section 59 B (1) & (4) of the *Civil Procedure Act* as read with Rules 32(1) and 35 of the *Civil Procedure (Court- Annexed Mediation) Rules, 2022*. The Applicants seek orders that:
 - a. The Honourable Court do find and order that the Mediation Settlement Agreement dated August 21, 2023 under the hand of Chacha Lucas Matiko is unjust and unlawful.
 - b. The Honourable Court be pleased to set aside in its entirety the Mediation Settlement Agreement filed in this Honourable Court by the Mediator Chacha Lucas Matiko.
 - c. The Honourable Court be pleased to hear the suit filed herein and deliver its Judgement.
 - d. The costs of this Notice of Motion be in the cause.



2. The application is premised on the grounds that the Mediation Settlement Agreement is not, as required by law, signed by a necessary party, Mary Moraa Nyaoso Mumanyi. It is alleged that the Mediator breached his mandate as a mediator in urging, encouraging and permitting Charles Ochanda Mumanyi to sign the Mediation Settlement Agreement on behalf of Mary Moraa Nyaoso Mumanyi despite of the unequivocal communication made to him to the contrary.
3. The Applicants accuse the Mediator of converting a partial Mediation Settlement Agreement into a complete Mediation Settlement Agreement. They argue that the Mediator acted in breach of Rules 32(1) and 35 of the *Civil Procedure (Court-Annexed Mediation) Rules* by excluding the Advocates for the parties during the execution of the Settlement Agreement.
4. The Applicants contend that the issues they raised in the 'Re- Amended Plaint' have not been addressed in view of Clauses 1 to 6 of the Mediation Settlement Agreement. This was despite them raising numerous issues in their case summary filed before the Mediator. It is only the issue of the boundary that was addressed. The issue of payment of damages for trespass and payment of costs of the suit were never addressed.
5. The application is further supported by the affidavits of Applicants. In her Affidavit, Mary Moraa Nyaoso Mumanyi deposed on December 13, 2023, avers that they purchased a parcel land known as LR No. 1160/617 measuring 1.2 acres jointly with her husband, the 1st Plaintiff herein from one Mr. Samuel Mose Nyamoto. They were however unable to pay the whole purchase price due to financial constraints. It was then that they opted to sell half (1/2) an acre portion to the Defendants. They remained with a portion measuring 0.7 acres. However, while installing a fence, the Defendants encroached on their portion and expanded theirs to approximately 0.5940 acres instead of 0.5 acres.
6. The 2nd Plaintiff reiterates that although they listed the issues they wished addressed in their case summary dated June 29, 2023 in the Mediation process, the Mediator did not address all the issues as he failed to address the issue of costs of the suit and damages for trespass on their parcel for over 17 years. She argues that the Mediator urged the 1st Plaintiff to sign the Settlement Agreement in the absence of her Advocate in express contravention of her instructions stated in her email dated August 16, 2023.
7. The 2nd Plaintiff asserts that the Mediator's actions contravene the provisions of Rules 32(1) and 35 of the *Civil Procedure (Court-Annexed Mediation) Rules* because her Advocate was not involved in the signing of the Agreement. It is for that reason that she rejects and repudiates the Mediation Settlement Agreement and seeks the reliefs stated in the application herein.
8. On his part, the 1st Plaintiff in his Supporting Affidavit deposed on December 13, 2023 avers that he supports the assertions made by the 2nd Plaintiff in her affidavit. He further avers that pursuant to a Consent Order entered on the February 26, 2009, the parties herein engaged a Surveyor who confirmed their assertions that the Defendants had encroached onto their land.
9. He denies participating in the Mediation proceedings on the alleged dates and avers that he appeared before the Mediator only on August 21, 2023 with their Advocate on record. However, due to other engagements, their Advocate left before conclusion of the proceedings. It was after their Advocate left that he was presented with a Settlement Agreement by the Mediator who asked the parties to sign.
10. He avers that although he noticed that the issues of damages for trespass and costs of the suit had not been addressed; the Mediator dismissed him and informed him that he could raise the same in Court before the Judge. The Mediator urged him to sign the Settlement Agreement on his own behalf as well as on behalf of the 2nd Plaintiff.



11. The 1st Plaintiff maintains that his Advocate ought to have present at the point of signing the Mention Settlement Agreement. He accuses the Mediator of misleading him into signing the Agreement.

Replying Affidavit

12. The application by the Plaintiffs is opposed by the Defendants vide the Replying Affidavit of Bruce Mokaya deponed on the January 26, 2024. He avers that the application is fatally defective, premature and an abuse of the court process. The orders sought are a departure from the law governing Mediation proceedings.
13. The 1st Defendant states that it is indeed true that the 2nd Plaintiff had not signed the Mediation Settlement Agreement but she had authorized the 2nd Plaintiff both orally and via the Letter sent to all the disputants and the Mediator. He asserts that parties executed the Settlement Agreement voluntarily at the conclusion of the mediation process. The terms of Settlement were well captured in the Agreement dated August 21, 2023.
14. The Defendants contend that although the parties were represented by their Advocates throughout the mediation sessions, in a mediation process, Advocates undertake an advisory role while the parties are allowed to lead the negotiations. In the instant case, parties are contractually bound by the terms of the Mediation Settlement Agreement having freely executed the same.
15. The Defendants therefore pray that the application be dismissed with costs. The application seeks to scuttle the progress made in resolving a dispute that has endured for over 17 years.

Further Affidavit

16. The Applicants filed a Further Affidavit sworn by Mary Moraa Nyaoso Mumanyi deponed on the March 18, 2024. In response to the Defendants' assertion that the application departs from the provisions of the *Civil Procedure (Court-Annexed Mediation) Rules 2022*, the Deponent affirms that the application seeks to ensure that the said provisions particularly Rule 32(1) are adhered to.
17. She maintains that she was out of the country on the date of the signing the Mediation Settlement Agreement and expressly authorized her Advocate and her husband to jointly sign the agreement on her behalf. Therefore, her Advocate having not signed, the Agreement is not valid. She further avers that the parties reached a partial Settlement Agreement given that the general damages of Kshs. 500,000/= per year and payment of costs of the suit were never agreed upon.

Court's Directions

18. The court directed parties to file their respective written submissions. The Plaintiffs' submissions are dated March 27, 2024 while the Further Submissions are dated May 9, 2024. The Defendants' submissions are dated April 8, 2024.

Issues for Determination

19. I have considered the application, the affidavits, the annexures thereto, the submissions by counsel and the applicable law. The issues for determination in my view are;
 - a. Whether the Mediation Settlement Agreement was properly executed;
 - b. Whether the Applicants are entitled to the reliefs sought.



Analysis and Determination

A. Whether the Mediation Settlement Agreement was properly executed;

20. The [Civil Procedure \(Court-Annexed Mediation\) Rules, 2022](#) is the law governing court-annexed mediations. Rule 16(1) and (2) provides that:
1. Parties or parties' advocates or representatives shall attend each mediation session and participate in the mediation process in good faith.
 2. The parties may be accompanied by an advocate or a representative.
21. Rule 17(1) on the other hand provides that;
- “Where a natural person participates in the mediation through a representative who is not an Advocate, the representative shall, at the first mediation session, present to the mediator written authority signed by the party indicating that the representative has been authorized to take part in the mediation process and execute a settlement agreement on behalf of that party”
22. A Mediation Settlement Agreement resolving some or all of the issues in dispute must be duly signed by the parties, the parties' advocates or representatives and the Mediator in accordance with Rule 32 (1). The Mediation Settlement Agreement becomes final and binding on the parties once it is adopted by the trial Court or the designated officer as provided for in Rule 34 of the said [Rules](#).
23. Mediation Settlement Agreements are in the nature of consent orders. A consent order would only be set aside on grounds which would justify the setting aside of a contract. See the case of [Re Estate of B.M. \(Deceased\)](#) [2019] eKLR. In Kenya Commercial Bank Ltd –vs- Benjoh Amalgamated Ltd, Civil Appeal No. 276 of 1997, the Court of Appeal stated that it is now settled law that a consent judgment or order had a contractual effect and can only be set aside on grounds which would justify the setting aside of a contract.
24. In the cases of [Flora N. Wasike v Destimo Wamboko](#) [1988] eKLR and in [Board of Trustees National Social Security Fund v Michael Mwalo](#) [2015] eKLR, the common thread is that a consent could not be set aside or varied unless it was demonstrated 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 misapprehension or ignorance of such facts in general or for reason which would enable the court to set aside an agreement.
25. From the record of the court, it is clear that the matter was referred to mediation with the consent of the parties. The 1st Applicant on his part does not deny attending and voluntarily participating in the mediation process. He however contends that although he signed the Mediation Settlement Agreement, he raised some concerns regarding damages for trespass and costs of the suit. However, that the Mediator ignored his concerns and ‘encouraged’ him to sign the Agreement on the understanding that his concerns would be addressed by the Court.
26. The 1st Applicant voluntarily signed the Agreement. He confirms that he read through the terms of the Agreement before executing it. He has not alleged that he did not understand the terms of the Agreement. He has not pleaded coercion; his allegations are not substantiated.
27. As for the 2nd Applicant however, it is not in dispute that she was not present during the mediation process. She however sent an email dated 16th August, 2023 to the 1st Applicant, her Advocate Mr.



N.W. Amolo and the Mediator which made it abundantly clear as to who would sign any agreement on her behalf. The email reads in part;

“...I have given to my husband Charles and our Advocate Mr. Amolo the necessary instructions to jointly represent me and finalize the dispute. They both shall sign any agreement on my behalf.”

28. From the email extract cited above, the 2nd Applicant appointed her Advocate and the 1st Applicant as her representatives to participate in the mediation proceedings. She expressly stated that both shall sign any agreement on her behalf.
29. It is not in dispute that the Applicants’ Advocate, Mr. N.W. Amolo never signed the Settlement Agreement. Evidently therefore, the instructions of the 2nd Applicant were not complied with. The Advocate was appointed as a representative of the 2nd Applicant and therefore his role was not limited to the advisory role in accordance with Rule 27 (d) the *Civil Procedure (Court-Annexed Mediation) Rules, 2022*.
30. It is therefore my finding that the Mediation Settlement Agreement was not properly executed. The Mediator did not adhere to the express wishes of the 2nd Applicant. Although the 1st Applicant signed on her behalf, the absence of execution of the Agreement by her expressly appointed Advocate invalidates the Settlement Agreement.

B. Whether the Applicants are entitled to the reliefs sought.

31. The 2nd Applicant having disowned the Mediation Settlement Agreement, it follows that the same was not obtained lawfully. Therefore it cannot be binding on her.
32. In the Indian case of *Gurpreet Singh v Chatur Bhuj Goel* [1988] AIR 400, the Supreme Court of India held that:

“Under Rule 3 as it now stands when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them.....”
33. The omission to obtain the Advocate’s signature as a duly appointed representative of the 2nd Applicant in the Settlement Agreement makes this matter suitable for setting aside. The 2nd Applicant has demonstrated that the Settlement Agreement does not reflect her wishes having not been signed in accordance with her instructions. The Mediation Settlement Agreement having not been duly executed by the 2nd Applicant, does not meet the threshold of Section 3(3) of the *Law of Contract Act*. The same is therefore not enforceable.
34. In the circumstances, this Court has no option but to set aside the Mediation Settlement Agreement for non-compliance with the procedure for execution of contracts.
35. For the foregoing reasons, the upshot of this court’s decision is that the Applicants’ Notice of Motion Application dated December 13, 2023 is merited and the same is hereby allowed. Consequently, the application is disposed in the following terms;
 - a. The Mediation Settlement Agreement dated August 21, 2023 be and is hereby set aside and/or vacated in its entirety.
 - b. This suit shall proceed to hearing.
 - c. The costs of the application shall be in the cause.



It is so ordered

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Amollo for the Plaintiffs/Applicants

Mr. Ondigi for the Defendants/Respondents

Court Assistant: Yvette

