



Soi & another (Suing as the administrator of the Estate of William Kimutai Soi alias Kimutai Soi Arap Cherugut - Deceased) v Soi & another (Environment & Land Case E053 of 2021) [2023] KEELC 713 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E053 OF 2021
MN MWANYALE, J
FEBRUARY 9, 2023**

BETWEEN

SABINA JEPNG'ETICH SOI 1ST PLAINTIFF

PAUL MUTAI 2ND PLAINTIFF

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF WILLIAM KIMUTAI
SOI ALIAS KIMUTAI SOI ARAP CHERUGUT - DECEASED**

AND

JOSEPH LANG'AT 1ST DEFENDANT

REBECCA SOI 2ND DEFENDANT

RULING

1. By chamber summons dated October 24, 2022 brought under section 28 (1) of the *Limitation of Actions Act* cap 22 Laws of Kenya and other enabling provisions of the law, the Applicants seek the following orders;
 1. That this honourable court be pleased to set aside the order made on July 28, 2022 adopting the mediation settlement agreement dated April 21, 2022.
 2. That this honourable court be pleased to set aside the court orders and the proceedings of July 28, 2022 and all other consequential orders.
 3. That the honourable court be pleased to reopen the mediation session and parties to be heard afresh.
 4. That the honourable court be pleased to appoint a different mediator from the previous one.
 5. That costs of this application be in the course.



2. This application is premised on the grounds set out on the face of it and supported by affidavit deposed by Joseph Langat on October 24, 2022.
3. The main grounds the application is premised on is that the mediation agreement refers to property registration number Nandi/kaboi/481 which does not exist as it was sub-divided into Nandi/kaboi/665 and Nandi/kaboi/662. Further that the 2nd defendant/applicant never participated or executed the mediation agreement.
4. In response to the application, the plaintiffs/respondents filed a replying affidavit sworn on November 4, 2022. The 1st respondent contends that the mediation sessions were related to ownership of 31 acres comprised within LR No Nandi/kaboi/481 and that the county surveyor Nandi confirmed that he will face, no difficulty enforcing the decree emanating from the mediation agreement. She states further that one of the sons of Kipsigei Arap Soi (deceased) by the name Richard Sigei actively participated in the mediation sessions.
5. On November 10, 2022, counsel for the plaintiff/respondent raised an issue of representation of the defendant. I note that this issue was equally raised in her clients replying affidavit. I wish to address the same in this instant. The firm of Korir, Jepleting and company advocates entered into a consent to come on record for the defendants in place of Duncan Tallam and company advocates as required by order 9 rule 9 of the *Civil Procedure Rules* once judgment has been rendered in a matter. Indeed the firm of SK Kitur and Company Advocates was on record for the defendants however, upon the demise of Counsel SK Kitur this court is aware that the firm of Duncan Tallam, and company advocates took former firm. The fact that no formal notice of change of advocates was filed, in this court's view, is merely a technicality that cannot bring me to strike but the instant application. At this juncture I invoke article 159 (2) (d) of the *Constitution of Kenya* which calls upon this court to administer substantive justice without undue regard to procedural technicalities. I therefore proceed to administer substantive justice through merit consideration of the instant application.
6. Parties herein filed written submissions to the application which submissions this court has taken into consideration.

Analysis And Determination: -

7. The issues for determination is whether the applicants have met the threshold for setting aside a mediation agreement otherwise referred to here as a consent judgment and whether the matter be referred back to mediation.
8. On July 28, 2022, this Court adopted mediation agreement dated April 21, 2022 and a consent decree issued on August 1, 2022. It is this consent decree that is the subject of this application.
9. The principles that appertain to setting aside of consent were stated in several cases including the Court of Appeal case of *Brooke Bond Liebig v Mallya* (1975) EA 266 where it was held that;

“The compromise agreement was made an order of the court and was thus a consent judgement. It is well settled that a consent judgment can be set aside only in certain circumstances eg on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enabling a court to set aside or rescind a contract.”



10. In *Kenya Commercial Bank Limited v Specialized Engineering Company Limited* (1980) eKLR, Harris J held that:-

“A consent order entered into by counsel 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 misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

11. The court, upon perusal of the mediation agreement and the consent decree, has established that the land referenced therein is LR No Nandi/kaboi/481 which property does not exist as it was subdivided into Nandi/kaboi/662 and Nandi/kaboi/665. This fact is not disputed by either party. What I deduce from this is that the mediator as well as the parties present during mediation session misapprehended the facts particularly the suit property thereby leading to a mediation agreement that was erroneous and one that cannot be enforced.
12. Moreover, the mediation agreement was not signed and/or executed by the 2nd defendant /applicant. Again this was not contested by the respondents, rather they contended that one Richard Sigei, a family member of the defendants/applicants, actively participated in the mediation session. This assertion was not proved by way of evidence. Moreover, from the record, Richard Sigei is a stranger in the proceedings, he is not a party to this suit hence his supposed active participation and execution of mediation agreement is inconsequential.
13. The absence of the 2nd defendant/applicant’s name and signature leads to one conclusion, that terms of the mediation agreement. Therefore there was no consent of all parties to the suit.
14. In view of the apparent error on the consent decree emanating from the mediation agreement, misapprehension of facts by the mediator and the parties involved as well as non-participation of all parties to the suit, the instant application is allowed, and the consent decree issued on August 1, 2022 is hereby set aside. It follows that proceedings of July 28, 2022 and other consequential orders are also set-aside and the matter is hereby reopened for mediation.
15. Since the parties were open to mediation and in view of the fact that they are family members the matter shall be referred to the Kaburwo council of elders under the traditional dispute resolution mechanism for mediation.
16. The Deputy Registrar to liaise with the chairman of the Kaburwo Council of Elders and inform the parties accordingly.

DATED AT KAPSABET THIS 9TH DAY OF FEBRUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Isiaho for the Plaintiff

Mr. Kiprono holding brief for Mrs. Chumba for Defendant.

