



**Wirell v Chepkosgey (Environment & Land Case 110 of 2015)
[2023] KEELC 19933 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19933 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 110 OF 2015
EO OBAGA, J
SEPTEMBER 19, 2023**

BETWEEN

NIL STAFFAN WIRELL PLAINTIFF

AND

EMILY CHEPKOSGEY DEFENDANT

RULING

Introduction

1. This is a ruling in respect of a notice of motion dated April 24, 2023 in which the Plaintiff/Applicant sought the following orders: -
 1. That the Honourable court be pleased to vary, set aside and/or review the Order made and recorded on November 21, 2019 by the Honourable Deputy Registrar Grace Sitati and all consequential directions, Rulings and orders of the court variously made on September 16, 2020, November 30, 2020, October 24, 2022 and November 10, 2022 in so far as it recognizes, affirms and seeks to enforce a purportedly non – existing partial mediation settlement agreement allegedly concluded in Eldoret Mediation No 203 of 2019 and adopted by the Court on November 20, 2019, and in addition seeks to subject and to limit the scope of the full trial of the suit to unresolved issues indicated in the Mediator’s confidential report dated October 17, 2019.
 2. That upon grant of prayers (10 above) the Defendants’ unresolved list of issues for determination by the court dated and filed in court on March 20, 2023 be and is hereby struck off the record, and a full hearing of the main suit be certified urgent and to further proceed expeditiously, considering the advanced age of the Plaintiff, the old age of the long outstanding suit and the nature of the long-protracted proceedings.



3. That in the alternative and without prejudice, this honourable court may be pleased to grant leave to the Plaintiff/Applicant, if the instant application is found to be unmerited, to file an appeal, out of time, against the orders, Ruling and directions set out in prayer 1 above.
4. That the costs of this application be borne by the Defendant/Respondent.

Background;

2. The Plaintiff and the Defendant first met in June 2010 and became friends. On March 17, 2011 the two purchased a house which was on LR No Eldoret Municipality/Block 14/360 which was subsequently registered in the joint names of the two. The two differed and the Plaintiff moved to court and filed a suit against the Defendant on April 16, 2015.
3. The plaint was later amended on May 2, 2015 in which the Plaintiff sought the following reliefs: -
 - a. An order that the joint ownership of parcel No ELDORET MUNICIPALITY BLOCK 14/360 by the Plaintiff and the Defendant be and is hereby severed.
 - b. A declaration the Plaintiff is the sole and absolute shareholder of the parcel No ELDORET MUNICIPALITY BLOCK 14/360 and all the household goods equipment and fittings therein.
 - bb. A declaration that the Defendant holds and is registered as a co-owner of the property No ELDORET MUNICIPALITY BLOCK 14/360 in trust for the Plaintiff.
 - cc. An order that upon the severance of the joint ownership the property No ELDORET MUNICIPALITY BLOCK 14/360 be sold at the market value and the proceeds of the sale be used to pay the mortgage debt due to Nordea Bank in Sweden and the remainder of the proceeds be apportioned accordingly.
 - c. An alternative prayer in terms of paragraph 11 and 12 above.
 - d. An order declaring that the Defendant is accountable to the Plaintiff in respect of all household goods and fittings and equipment amounting to Kshs 5,000,000/=
 - e. An order do issue to the Deputy Registrar authorizing her to sign any documents the Defendant may refuse to sign.
 - f. Costs of this suit together with interest at court rates.
 - g. Any other or alternative relief which this honorable court deems fit to grant.
4. The Defendant filed a defence which was later amended to include an amended counter-claim in which she sought the following reliefs:-
 - a. The joint ownership between the Plaintiff and Defendant over land parcel number No ELDORET MUNICIPALITY BLOCK 14/360 be severed and be divided equally between the Plaintiff and the Defendant with the option of the Defendant buying out the Plaintiff's half share of the property upon joint valuation of the property.
 - b. In the alternative the joint ownership between the Plaintiff and Defendant over land parcel number No ELDORET MUNICIPALITY BLOCK 14/360 be severed and the property be jointly valued and upon sale of the aforesaid property, the proceeds thereof be divided equally between the Plaintiff and the Defendant.



- (b) costs of the suit.
5. On March 8, 2019, the Plaintiff's Advocate wrote a letter to court asking that the file be screened with a view to being referred to the Court Annexed Mediation. The file was subsequently screened and was sent to mediation. A duly appointed mediator conducted mediation whereby six partial mediation settlements were reached between September 5, 2019 and October 17, 2019. The six partial mediation settlements were all adopted by Lady Justice (Dr) Odeny on November 20, 2019.
 6. The mediation Deputy Registrar then gave directions in the file on November 21, 2019 returning the original file to the Environment and Land Court Registry as there had been partial settlements which had been adopted by the Judge. The mediator had written a confidential report in which he confirmed that a partial settlement had been reached and that the remaining issues be resolved by the court.
 7. On September 16, 2020, counsel for the Plaintiff brought to the attention of the court that there was a mediator's confidential report which had identified unresolved issues. The judge then asked the parties to frame issues on the unresolved issues.
 8. When I had started handling this matter, counsel for the Plaintiff indicated that this was a part heard matter but that he wished the matter to start afresh. The case then started afresh. After evidence of two witnesses, the counsel for the Defendant indicated that this was a matter which had been concluded. This prompted me to ask for time to go through the file and make a comprehensive ruling. After I went through the file, I wrote a comprehensive ruling detailing what I had found out from the record. It is my ruling of November 10, 2022 which prompted the Plaintiff/Applicant to file the present application.

Applicant's contention

9. It is the Applicant's contention that there was no partial settlement in this matter and that the ruling of November 10, 2022 was arrived as a result of misleading position from the Defendant's counsel. The Applicant states that the court had previously made a finding that there was no partial settlement and that the court shifted its position vide ruling of November 10, 2022. The Applicant argues that the directions of the court on November 21, 2019, September 16, 2020, October 24, 2022 and November 10, 2022 were unprocedurally, wrongly, unconstitutional, improper and unlawfully arrived at.
10. The Applicant argues that he was not given an opportunity to file a formal application and that the effect of the directions and rulings herein have effectively driven him out of the seat of justice. The Applicant argues that the orders of Justice (Dr) Odeny made on November 20, 2019 were not made in the presence of the parties either in open court or in chambers.
11. The Applicant blames his erstwhile Advocates for being misled into believing that there was a partial settlement.

Respondent's contention;

12. The Respondent contends that the Applicant's application is made belatedly and in bad faith; is incompetent, mischievous, baseless and an afterthought. The Respondent further contends that the Applicant has not raised any of the known grounds for review known under order 45 of the *Civil Procedure Rules*. The Respondent argues that the Applicant's application has been brought 3 ½ years after the partial settlement were recorded.
13. The Respondent argues that the Applicant is seeking to review nonexistent orders made on November 21, 2019 and that the matter was referred to Court Annexed Mediation at the behest of the Applicant's lawyer. The Applicant is now disowning a process which was initiated by his own lawyer.



Analysis and determination;

14. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions made during the hearing. There are three issues for determination. The first is whether the orders and or directions given on November 21, 2019, September 16, 2020, November 30, 2020, October 24, 2022 and November 10, 2022 should be reviewed and set aside. The second is whether the issues framed by the Defendant/Respondent and filed in court on March 20, 2023 should be struck off. The third is whether leave to appeal out of time against the orders and directions in issue number one should be granted.
15. Under the provisions of order 45 of the Civil Procedure Rules and order of the court may only be reviewed where it is shown that there is either an error apparent on the face of the record, where there is discovery of new and important evidence which could not be availed with due diligence at the time the order was being made or on any sufficient cause. Of course the application for review has to be made without unreasonable delay.
16. In the instant case, the orders and or directions which are sought to be reviewed were made between November 21, 2019 and November 10, 2022. On November 21, 2019, the mediation Deputy Registrar made directions that the file be returned to the parent registry read Environment and Land Court registry as the partial mediation settlements had been adopted by Lady Justice (Dr) Odeny. This was an administrative duty bestowed upon the mediation Deputy Registrar. Following those directions, a letter was written forwarding the original file back to the registry. There is therefore nothing to review in these directions and in any case, if there was anything to be reviewed, the application for review should have been directed to the mediation Deputy Registrar.
17. As regards the order of September 16, 2020, Lady Justice (Dr) Odeny was categorical that according to the confidential report by the mediator, there were unresolved issues. She directed the parties to frame issues on the unresolved issues for hearing before the court. There is no error apparent in this order. The Applicant's lawyer had clearly pointed out to court that the matter had been partially settled. There is therefore absolutely no ground to review this order.
18. On the issue of the order of November 30, 2020, I can see from the court record that the Judge directed the Plaintiff to furnish the Defendant with original bank statements within 14 days. There is no error apparent in this order. This order was made because there was an attempt to produce copies of bank statements which were objected to by the Defendant during hearing. It is on this basis that the court directed the Plaintiff to produce original bank statements. There is therefore nothing to review in this order.
19. As regards the orders of October 24, 2022, I notice that there were two orders made on that day. The first was that the court had perused the court file and confirmed that the six mediation settlements were reduced into orders of the court. This was following the inquiry from Mr Yego for Defendant. I then gave parties time to peruse the court file and confirm the position. When the court resumed, Mr Odhiambo for the Plaintiff was of the view that there was no adoption of the mediation settlements. He submitted that the judge merely recorded the mediation agreements. It is at this juncture that I asked the parties to give me time to go through the file and make a comprehensive ruling.
20. In both the orders which were made on October 24, 2022, there was no error apparent on the face of the record. If I made an erroneous finding on the issue of the six settlements having been adopted which is not the case, then that can be a good ground for appeal and not review. I therefore find that there is nothing to review in both orders made on October 24, 2022.



21. Finally, on the directions or orders made on November 10, 2022, there is no error apparent on the face of the record. What the Applicant has done is to attack my findings as if the attack was directed before the Court of Appeal. If I made any erroneous findings or changed my earlier position as the Applicant claims, then the proper forum to do that is before the Court of Appeal. I cannot sit on appeal in my own ruling. I cannot purport to justify my reasoning as this is not the province of review. There is absolutely no error apparent on the face of the record to warrant a review.
22. On the second issue, the Applicant wants the issues framed by the Respondent and filed on March 20, 2023 struck out. There is absolutely no basis for striking out the issues. The issues were filed pursuant to the express directions of the Judge given on September 16, 2020 where the Judge directed that parties frame unresolved issues for hearing by the court. The judge did not give any timelines for filing of those issues. There is therefore no basis for the Applicant to ask that the issues filed by the Respondent be expunged.
23. On the last issue, the Applicant is asking in the alternative that he be granted leave to appeal against the directions and or orders out of time. It is important to note that the partial mediation settlements were adopted on November 20, 2019. The impugned directions and orders followed as from November 21, 2018 to November 10, 2022 when comprehensive ruling on the matter was made. The Applicant has never manifested any intention to appeal against any of those orders or directions. To seek to appeal against orders or directions which were issued way back in November, 2019 is to say the least a mockery of justice.
24. Extension of time to appeal out of time is not a right of a party. The factors to be considered were laid out in the case of *Nicholas Kiptoo Korir Arap Salat – Vs- IEBC and 7 others (2014) eKLR*. The Supreme Court of Kenya stated as follows:- The underlying principles a court should consider in exercise of such discretion should include:-
 - a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
25. In the instant case, the Applicant has moved the court for extension after almost four years later. There is no explanation given why the Applicant did not appeal against those orders or directions.

Disposition;

26. From the above analysis, it is clear that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF SEPTEMBER, 2023.



E. O. OBAGA
JUDGE

