



**Ward v Standard Limited & another (Civil Case 1062 of 2005)
[2024] KEHC 2116 (KLR) (Civ) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 1062 OF 2005

AN ONGERI, J

MARCH 1, 2024

BETWEEN

JOHN WARD PLAINTIFF

AND

THE STANDARD LIMITED 1ST DEFENDANT

PRAVIN BOWRY 2ND DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 19/10/2023 seeking leave to set aside the consent reached by the parties.
2. The application is brought under Section 1A, 1B, 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Rules 39 (1), (3) (e) and 56 of the *Civil Procedure (Court Annexed Mediation) Rules*, 2022) seeking the following prayers
 - i. That this honourable court be pleased to grant leave to the 2nd defendant/applicant to file an application for setting aside of the order/judgment issued by this honourable court (the Hon. Lady Justice Asenath Ongeru) on 17th October, 2023 arising from a mediation settlement agreement filed in this cause on 30th May, 2023.
 - ii. That this honourable court be pleased to stay the execution of the order/judgment issued in these proceedings on 17th October, 2023 pending the grant of leave sought by the 2nd defendant and pending the filing of the 2nd defendant's application to set aside the order/judgment of 17th October, 2023.
 - iii. That costs of this application be provided for.



3. The application is based on the following grounds;
 - i. That the plaintiff in this cause died on 7th June, 2023 and the mediation settlement dated 30th May, 2023 was adopted as an order of the court on 17th October 2023 four (4) months and ten (10) days after the death of the plaintiff.
 - ii. The subject matter of this case and the mediation proceedings was founded on a claim for defamation and with the death of the plaintiff, the subject matter no longer exists and the outcome of the mediation settlement agreement dated 30th May, 2023 has been materially affected.
 - iii. A judgment entered in favour of a deceased plaintiff in a defamation case is essentially a nullity and cannot stand in law.
 - iv. It is unfair and inequitable to issue an order in a defamation suit in favour of a deceased plaintiff four (4) months and ten (10) days after the death of the plaintiff.
 - v. That by virtue of the death of the plaintiff, the settlement agreement adopted as an order and judgment of the court in a defamation suit cannot be validly enforced under the Laws of Kenya and is incapable of enforcement.
 - vi. That the 2nd defendant/applicant raises triable issues that would require further interrogation by the court and it is in the interest of justice and fairness that the leave sought is granted to allow the 2nd defendant/ applicant file and canvass the intended application.
 - vii. That this application has been presented at the earliest opportune moment without undue delay.
4. It is supported by the appellant's affidavit sworn on 19/10/2023 in which he on 7th March 2023, this court referred the matter to court annexed mediation and on 16th March, 2023, the mediation registry notified the parties of the appointment of the Rev. Geoffrey Njenga as the mediator.
5. That the parties attended four (4) mediation sessions held on 31st March 2023, 11th April 2023, 3rd May 2023 and 4th May 2023 and reached a mediation settlement agreement dated and filed in this cause on 30th May, 2023.
6. That under the aforesaid mediation settlement agreement dated 30th May 2023, the 2nd Defendant agreed to pay the plaintiff a sum of Kenya shillings one million (Ksh.1,000,000/=).
7. That on 7th June, 2023, the money was transmitted the sum of Kenya shillings one million (ksh.1,000,000/=) to M/s Shapley Barret and company advocates, the plaintiff's advocates, for them to hold the funds in trust and on a stakeholder basis pending the adoption of the mediation settlement agreement as an order of the court.
8. That later, the plaintiff, Mr. John Ward unfortunately passed away on the same day, being the 7th day of June, 2023 before the mediation settlement agreement had been adopted as an order or judgment of the court and requesting a refund of the monies transmitted to the said advocates on 7th day of June, 2023.
9. That Mr. D. Oyatsi of Shapley Barret and company advocates in which Mr. Oyatsi argues that the death of Mr. John Ward has no legal effect on the mediation settlement agreement and that a request for refund of the kshs.1,000,000/= paid to Shapley Barret and company advocates is a claim to be made against the estate of the deceased.



10. That the adoption of the mediation settlement agreement as an order/judgment of the court was done on 17th October, 2023 being four (4) months and ten (10) days after the demise of the plaintiff.
11. That it is settled principle of law that compensation for defamation may not be maintained in respect of defamation of a deceased person on the principle that a personal right of action dies with the person (“action personalis moriturum cum persona”).
12. That under the provisions of Section 2(1) of the Law Reform Act, a defamation suit such as that of the plaintiff herein, does not survive the deceased even if the deceased plaintiff died after an interlocutory judgment had been entered in his favour.
13. That at the time the plaintiff’s death on 7th June, 2023, no order and/or judgment had been entered in this suit and the plaintiff therefore died before the court adopted the mediation settlement agreement has an order/ judgment of the court.
14. That as at the date of the plaintiff’s death on 7th June 2023, the matter had not been concluded and the suit was still pending. The pending suit did not and cannot survive the deceased.
15. That with the death of the plaintiff, the subject matter of this case which is founded on defamation no longer exists and the outcome of the mediation settlement agreement dated 30th May, 2023 has been materially affected since the terms of that agreement cannot be enforced by the deceased plaintiff or in favour of the deceased plaintiff.
16. That it would be unfair and unequitable to enforce an order in favour of a deceased plaintiff in a defamation suit when the said Order is issued four (4) months and ten (10) days after the death of the plaintiff.
17. That some of the terms of the order are incapable of compliance and in particular, an apology published after the death of the plaintiff will be tantamount to apologizing to a deceased person which will not achieve the desired purpose of the mediation settlement agreement.
18. That the said order cannot also be enforced against the 1st defendant in that the 1st defendant cannot pay monies to a deceased plaintiff in a defamation suit.
19. The plaintiff’s counsel opposed the application and filed grounds of opposition in which it is stated as follows;
 - i. That the application dated 19th October, 2023 is misconceived and an abuse of the court process.
 - ii. That the 2nd defendant is estopped by conduct and law from bringing the application.
 - iii. On the applicant’s own admission, the plaintiff died on 7th June 2023 seven (7) days after he reached or entered in to mediation settlement with the 2nd defendant on 30th May 2023.
 - iv. It was expressly stated and agreed in the said mediation agreement exhibit PB-1 entered into between the plaintiff and the defendants as follows;

“that with effect from the date of this agreement, the High Court Civil Case No. 1062 of 2005 is and be withdrawn and the matter stands resolved by mutual consent” (emphasis added)
 - v. That having agreed with the plaintiff that the case stood as withdrawn and the matter is resolved by mutual consent with effect from 30th May, 2023 and further, having paid to the plaintiff



the sum of kshs. 1 million in the performance and discharge of his obligations under the said mediation agreement, the 2nd respondent is estopped by his conduct and by law from now saying that this case had not been resolved or withdrawn as at the time when the plaintiff subsequently died on 7th June 2023.

- vi. That the determination of the parties' legal rights in the suit was made by consent of the parties in the Mediation Agreement of 30th May 2023, and not the subsequent recording of the said consent in court on 17th October 2023.
 - vii. That in any event, the law on termination of defamation proceedings for the protection of reputation only cited and relied upon by the 2nd defendant does not apply to the protection of inherent human dignity as guaranteed under Article 28 of the constitution being a separate cause of action.
 - viii. That after promulgation of the constitution in 2010, every person has a constitutional right to protect his or her inherent dignity through or in defamation proceedings, which protection is in addition to the protection of reputation only and is a separate cause of action.
 - ix. That the plaintiff did not lose his right to inherent dignity upon his death.
 - x. That the recording of the said consent freely entered into by the parties to withdraw and terminate the case was a mere formality to close the court case file and did not alter the agreement by the parties made on 30th May 2023 that the case stood as resolved or withdrawn with effect from the said date of 30th May 2023.
20. The parties filed written submissions as follows; the 2nd defendant/applicant submitted that he specifically satisfied the ground stated under Rule 39(3) (e) of the Civil Procedure (Court Annexed Mediation) Rules 2022 that provides;
- “(3) The following shall constitute the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement—
 - (e) where the settlement agreement is invalid under Kenyan or international law, or is or has become incapable of enforcement under Kenyan law. ”
21. The 2nd defendant/applicant submitted that the agreement had its foundation on the proceedings in Nairobi High Court Civil Case No. 1062 of 2005. The Mediator and the parties were dealing with the issues arising out of the pleadings filed in the aforementioned case. The said matter was a defamation case and the cause of action in defamation cases does not survive the death of a party to the case.
22. The applicant contended that actions for defamation do not survive for the benefit of one's estate and it is this position that informed the applicant's demand for a refund of the sum of Kshs. 1,000,000 which was paid to the Plaintiff's Advocates on 7/6/2023.
23. That the agreement between the parties was incapable of being adopted as an order/ decree of the court on 17/10/2023.
24. In support the applicant cited the case of Hon. Emmanuel Karisa Maith v. The Nation Media Group Ltd & Another [2007] eKLR where it was held;
- “.....This suit, being a defamation suit, by reasons of the proviso to Section 2(1) of the Law Reform Act (Cap 25), which is in mandatory terms, the suit does not survive the deceased



plaintiff even if the plaintiff died after an interlocutory Judgment had been entered in his favour.....”

25. The 1st defendant supported the arguments by the applicant and reiterated the same in its submissions.
26. The plaintiff alternatively submitted that the 2nd defendant has not produced any evidence in his application to prove the allegation that the said sum of Kshs. 1 million was remitted or paid to M/s Shapley Barret & Co. Advocates for them to hold the funds in trust and on a stakeholder basis pending the adoption of the agreement as an order of the court. As he readily admits this is a statement of fact which can only be proved and established by evidence.
27. The plaintiff submitted the doctrine of election or choice is explained and applied in a binding decision of the Court of Appeal in Civil Appeal No. 25 of 2016 [Kenya Chemical and Allied Workers' Union vs Bamburi Cement Limited](#) as follows:

“Now on that question there are a great many cases; they are collected in the notes to *Dumpor's case* 1 Sm L C 8th edn 47, 54 and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered, 'Quod semel placuit in electionibus, amplius displicere non potest.' ...and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things, you cannot retract it and do the other thing; the election once made is finally made.”
28. The plaintiff contended that applying the above doctrine to the facts of this case, and on the admission of the 2nd Defendant, the dispute was commenced in the High Court as HCCC No. 1062 of 2005. As readily admitted by the 2nd Defendant the parties agreed by consent to refer the dispute to Court annexed mediation and the parties reached an agreement on 30/5/2023 in which they again expressly agreed that with effect from that date, HCCC No. 1062 of 2005 is and be withdrawn and the matter stands resolved by mutual consent.
29. The plaintiff contended thus that the 2nd defendant cannot retract from the said consent or agreement to refer the dispute to mediation and further retract from the agreement reached through the said mediation to resolve the dispute with effect from 30th May 2023, and now turn around and purport to allege that the agreement reached was conditional or to be sanctioned by this court before it took effect.
30. The issues for determination in this application are as follows;
 - i. Whether the consent should be set aside.
 - ii. Whether the parties are bound by the doctrine of election.
31. On the issue as to whether the consent agreement at mediation should be set aside, I find that the parties reached a settlement on 30/5/2023.
32. On 7/6/2023, seven days after the mediation settlement the plaintiff died. The mediation settlement was adopted as the judgment of the court on 17/10/2023.
33. The 2nd Defendant/Applicant is seeking to set aside the consent entered on 30/5/2023 on the basis that Causes of action of a personal nature do not survive for the benefit of a deceased's estate.
34. Further, that the legal maxim *actio personalis moritur cum persona* (a personal action dies with the person) applies to such causes of action.



35. Section 2(1) of the *Law Reform Act* (Cap 21)
On the death of any person,
“All causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate:
Provided that this section does not apply to causes of action for defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on ground of adultery.”
36. However, I find that in the current case the parties had already entered into a consent settling the case at the time the plaintiff died on 7/6/2023.
37. The consent was entered into on 30/5/2023 in the following terms in paragraph (1) of the mediation agreement:
“that with effect from the date of this agreement, the High Court Civil Case No.1062 of 2005 is and be withdrawn and the matter stands resolved by mutual consent”.
38. On 19/10/2023, the 2nd defendant filed this application seeking to set aside the mediation settlement agreement.
39. I find that the agreement states that High Court Civil Case no. 1062 of 2005 was to be withdrawn and the matter was to stand “resolved by mutual consent”.
40. I find that the application to set aside the consent has been overtaken.
41. I find as at the time the plaintiff died on 7/6/2023, there was no case as the same stood withdrawn on the date the agreement was entered which was on 30/5/2023.
42. The argument that a defamation suit does not survive the plaintiff does not hold since this matter had already been dissolved by mutual consent before the plaintiff died.
43. I agree with the plaintiff’s counsel’s argument that the right to dignity is not extinguished by the death of a person.
44. The fact that the agreement has not been recorded in court is immaterial as the parties had elected to have the dispute resolved and the case withdrawn.
45. The capturing of the agreement in court is a technicality of procedure which should not override the issue substantive justice between the parties.
46. The plaintiff died knowing this long-standing case had been resolved since the legal rights of the parties had been captured by the agreement dated 30/5/2023.
47. On the issue as to whether the parties are bound by the doctrine of election, I find that the parties voluntarily agreed to have the matter referred to court annexed mediation.
48. Article 159(2) (c) provides for alternative forms of dispute resolution and therefore it is the constitutional mandate of the court to promote mediation and other alternative forms of dispute resolution.
49. The parties in this case agreed to settle this case at mediation and therefore this case has been amicably settled.



- 50. Article 159 (2) (c) has elevated mediation and other forms of alternative dispute resolution to a constitutional imperative which tribunals and courts can use to resolve disputes.
- 51. To allow this application would negate all the positive benefits gained from embracing alternative forms of dispute resolution.
- 52. This case is an affirmation that mediation works even in cases of defamation which are known to be acrimonious.
- 53. This case which had been pending in court for 18 years is a resounding success which proves that mediation is a timely and effective method of resolving disputes.
- 54. I dismiss the application dated 19/10/2023 with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

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A. N. ONGERI
JUDGE

