Kenya Alliance Insurance Company Limited v County Attorney for Nyandarua County; Methu & 2 others (Interested Parties) (Miscellaneous Civil Case E023 of 2024) [2024] KEHC 15142 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEHC 15142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

MISCELLANEOUS CIVIL CASE E023 OF 2024

AK NDUNG'U, J

SEPTEMBER 23, 2024

BETWEEN

KENYA ALLIANCE INSURANCE COMPANY LIMITED ..... CLAIMANT

AND

COUNTY ATTORNEY FOR NYANDARUA COUNTY ..... RESPONDENT

AND

SENATOR (HON) JOHN MUHIA METHU ..... INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) .... INTERESTED PARTY

PUBLIC PROCUREMENT & REGULATORY AUTHORITY .... INTERESTED PARTY

RULING

1. This ruling resolves the application by way of Notice of Motion dated 05/07/2024 and amended on 22/07/2024 The application seeks the following orders;

    i. That this court be pleased to enjoin the 1st, 2nd and 3rd proposed interested parties as interested parties in these proceedings and stay the adoption of the mediation agreement herein pending hearing and determination of the application to be filed in the event that prayer no. 2 hereinbelow is granted.

    ii. The honourable court be pleased to grant the 1st proposed interested party leave to file an application for an order to set aside the Claimant's and Respondent's private mediation agreement dated 20/06/2024 facilitated by Mr Francis Karoki.

iii. That the mediator Mr Francis Karoki be ordered to supply the 1st proposed interested party with all pleadings, documents, materials, proceedings and any other or further evidence presented to him during the mediation process.

iv. Costs be provided for.

2. The application is based on the grounds on the face thereof and is supported by an affidavit deponed by the 1st proposed interested party, the Senator of Nyandarua County. He averred that he brings this application in accordance with his mandate to ensure prudent application of public resources, observance of principles of accountability and transparency and charge of such resources in strict compliance with the law.

3. He deponed that the procurement of medical insurance service by a contract dated 17/11/2023 between the Claimant and the Respondent was a fraud and breached the principles of *the Constitution* and the law and was entered despite an advisory that was issued by the 3rd proposed interested party. Further, the contract was driven by a criminal agenda since it was moved with a historical speed from the time of commencement to the signing of the contract. That the director and officer in the supply chain management vide letters dated 31/10/2023 and 30/10/2023 respectively expressed their commitment to follow the law in procurement process but they were moved to other departments vide letters dated 02/11/2023 and 03/11/2023 respectively.

4. That his advocate on record wrote to the 3rd proposed interested party who through their letter dated 09/01/2024 revealed that the matter is subject of investigations. That the advocate also copied the letter to the 2nd proposed interested party who has not reported back. That despite the Respondent having conceded to the rejection of the irregular and illegal contract by its letter dated 24/11/2023, the parties entered into another illegal and irregular contract dated 30/11/2023. The Respondent also proceeded and paid the Claimant an amount of Kshs.11,558,695/- and they hurriedly entered into a mediation process to facilitate the payment of Kshs.39,649,124/- at the pain of people of Nyandarua who lack basic facilities.

5. Based on the foregoing, he averred that he should thus be allowed to defend the interests of the people of Nyandarua and be allowed to challenge the mediation agreement dated 20/06/2024 before the same can be adopted as the same would have great implication on the people of Nyandarua since the mediation agreement was founded on fraud and was in breach of *the Constitution* and the law. That the mediation agreement was not founded on good governance and in particular people and stakeholder engagement through public participation and therefore, the same was a nullity ab initio.

6. The Claimant filed grounds of opposition and a replying affidavit dated 16/07/2024 sworn by Linda Njenga, the Claimant's legal manager. She averred that the Claimant and the Respondent entered into a contract dated 17/10/2023 for the provision of medical insurance cover policy to the Respondent's staff which was awarded to the Claimant after a competitive procurement process and the award was not challenged before the 3rd proposed interested party. That section 28 and 173 of the *Public Procurement and Asset Disposal Act* grants original jurisdiction to the public procurement administrative review board to hear and determine all tendering and procurement disputes and the Act only grants this court an appellate jurisdiction under section 175. Therefore, the application is unprocedural and an abuse of the court process as the proposed interested parties have never lodged any complaint with the board. She further averred that there is no basis for joining the proposed interested parties as they have nothing useful that would aid the court.

7. The Respondent in opposing the application filed a replying affidavit dated 15/07/2024 sworn by Alex Mwaura, former chief officer in charge of public service in the department of public service,

administration and devolution. He averred that the process of procurement was compliant with the procurement and regulatory laws since the open tender was advertised in the standard newspaper, government public procurement information portal and county website on 08/09/2023 with an addendum issued on 14/09/2023 and a total of eight bidders submitted their tenders. The bids were opened on 21/09/2023 in presence of seven representatives from the firms that submitted their bids and a tender opening committee oversaw the exercise. The appointed member of tender evaluation committee conducted their own individual analysis of the bidders with the most responsive bidder being the Claimant herein and a letter of intention to award was done on 03/10/2024 and regret letters were issued to unsuccessful bidders.

8. He averred that the Claimant issued its acceptance letter on 06/10/2023. In response to paragraph 9 and 10 of the 1st proposed interested party affidavit, he stated that the letter referred thereto were in response to a general letter by 3rd proposed interested party on procurement and payment process and the officers were barely committing to follow the law and were not addressing the procurement of medical insurance cover. That the rotation of the officers was also not related to the matter at hand and the allegation that the advertisement for the positions were to instil fear is misleading and untrue. He averred that the complaint referred in paragraph *14* and the letter by the 3rd proposed interested party did not indicate that the subject matter was illegal and the fact that the procurement was under investigations and EACC has not communicated to the Respondent intimating that the matter is under active investigations.

9. Further, the department of public service, administration and devolution carried out consultative forums in all five sub-counties whereby staff preferred to be covered by NHIF and only 80 staff wished to be covered by the Claimant. That in response to paragraphs *17*, *18* and *19*, the mathematical calculations averred are incorrect since the Claimant had covered 1801 staff for a period of 35 days at a cost of Kshs.39,649,124/- and Kshs.11,558,695/- paid out was for the cover of remaining 80 staff for a period of 11 months. That the mediation process emanated from a statement of claim filed by the Claimant and was conducted by Mr. Francis Karoki, an accredited professional mediator after consulting the Insurance Regulatory Authority who advised the parties to go for mediation.

10. Further, the proposed 3rd Respondent replied to the Respondent and concluded that the subject procurement was largely carried out in accordance with procurement laws. That the 1st proposed interested party motive of challenging the mediation agreement is politically motivated and allegations of fraud are unsubstantiated and the application is marred with unsubstantiated claims and therefore, the application is an abuse of the court process.

11. In rejoinder, the 1st proposed interested party filed a supplementary affidavit dated 23/07/2024. He averred that he seeks to be enjoined to challenge the mediation agreement before it is adopted on grounds of fraud and to prevent massive loss of Kshs.100,000,000/- of the people of Nyandarua. He maintained that the tender process was fraught with irregularities and the scoring that led to the award of tender to the Claimant was deliberately omitted. That the order of deployment of staff was from county secretary and head of public service and not county public service board. That the proposed 3rd interested party had already raised a red flag on irregular procurement and the letter dated 15/07/2024 by the 3rd interested party is very suspicious and was crafted in mind of this matter and has missing pages.

12. Further that the alleged correspondence from Insurance regulatory Authority was not attached. That the decision to move from NHIF to the Claimant was without consent from the users as none of the 80 staff chose to remain with the Claimant and the procurement of NHIF was within the county's budget. That the Respondent committed an offence under the *Public Procurement and Asset Disposal*

Act and the purported contract and the application to adopt the mediation agreement is a dirty scheme to misappropriate public funds.

13. In response to the Claimant's replying affidavit, he deponed that he could not have appealed to the public procurement administrative review board as the illegal procurement and contract were cancelled through a letter dated 24/11/23 after protest from the staff and people of Nyandarua. He maintained that the procurement and contract were a nullity ab initio and the mediation agreement was not a private agreement as it involved public resources and the public input should have been taken into account before mediation process. He maintained that the mediation agreement is not capable of being adopted as the same is founded on irregularities and fraud.

14. The Claimant also filed a supplementary affidavit where she deponed that the procurement process was above board and there was no criminal offence and it is unfathomable that the Respondent would enter into medical insurance scheme without planning and budgeting. That the Respondent did not cancel the contract since the staff were consulted and opted to be covered by NHIF and the remaining 80 opted to be covered by the Claimant and they proceeded to negotiate the terms of the new cover for the 80 employees which was agreed upon. She maintained that any party aggrieved by the procurement process should apply for review to the public procurement and regulatory board within 14 days and the time of appeal to the board has since lapsed. Further that all monies received by the Applicant from county government are not proceeds of crime.

15. The 2nd and 3rd proposed interested parties did not respond to the application.

16. The application was disposed of by way of written were ordered submissions. The 1st proposed interested party submitted that Rule 39(1) of the Civil Procedure (Court Annexed Mediation) Rules 2022 (hereby referred as the Rules) provides that a party must seek leave to file an application for setting aside mediation agreement. He submitted that Article 10 of *the Constitution* was ignored during the mediation process as neither the people nor their representatives were involved and therefore, the process was a nullity ab initio. Further, the purported procurement and the mediation process were products of criminal liabilities since the Respondent had no capacity to make such an award in view of section 53(8) of the *Public Procurement and Asset Disposal Act* which states that accounting officer can only commence procurement process after satisfaction that there are sufficient funds to meet the contract reflected in the approved budget estimate and section 53(9) makes it a criminal liability if the above provision is not complied with.

17. That the parties breached Article 227 of *the Constitution* in that the Respondent moved from government to government premium insurance cover of Kshs.44,420/- per officer to Kshs.131,443/- and covered 80 officers at Kshs.864,882/- and in further conspiracy between the Claimant and the Respondent, Kshs.11,558,695/- was paid without any services being rendered. That they further conspired through the mediation process to pay the Claimant Kshs.38,149,124/- and therefore the mediation agreement is fraught with illegalities and fraud and is in breach of *the Constitution* and the law hence the same cannot be adopted nor enforced. That the 2nd and 3rd interested party should also be enjoined to the suit as they have defined roles to play and do have fundamental interests under *the Constitution* and the law with a view of challenging the mediation process.

18. The Claimant on the other hand filed submissions dated 05/09/2024 and argued that the proposed interested parties were not involved in the mediation and therefore, they have no business of wanting to be enjoined during the adoption of the mediation agreement and they have nothing useful to aid the court and the parties in concluding the matter. That they have not illustrated their personal stake and interests in the proceedings and how they will be affected by adoption of the agreement as they

do not fit the definition of an interested party as was defined in the case of Muruatetu & another v R; National Commission on Human Rights & 2 others (2016) KESC 12 (KLR).

19. Further that the 1st proposed interested party has not demonstrated any identifiable and proximate personal interest to warrant the proposed interested parties to be enjoined and has failed to outline any prejudice to be suffered if they are not enjoined. That the 1st proposed interested party has made criminal allegations against the Claimant and the Respondent which he has failed to prove and unproven allegations of illegality cannot suffice in court. It was further submitted that the application is an abuse of the court process as the issues raised in the application and submissions should be directed to the procurement board. Further, the 1st proposed interested party seeks to introduce new issues of alleged criminal activity and fraud whereas an interested party is barred from introducing news issues in proceeding where they seek to be joined or have been joined as was held in the Muruatetu case (supra) that an interested party may not frame its own fresh issues or introduce new issues for determination by the court.

20. On the issue of setting aside mediation agreement, the counsel submitted that pursuant to Rule 39(3) of the Rules, the grounds for setting aside a mediation agreement are designed to be used by the parties to the mediation and not by an outside party which is in line with the fundamental principle that mediation is a voluntary process where conflicting parties reach to an agreement on their own. It therefore follows that only the conflicting parties can apply for setting aside of the mediation agreement and therefore, the proposed interested parties have no locus standi.

21. Counsel submitted that the 1st proposed interested party has not illustrated any ground for setting aside the mediation agreement. Therefore, the application is baseless and will go against the administration of justice if this court stay the adoption of the mediation agreement. On prayer number three of the application, the counsel submitted that the mediation proceedings and documents produced are confidential and another principle of mediation is inadmissibility whereby under this principle, even a court cannot admit a document that was produced during mediation proceedings.

22. The Respondent on the other hand filed written submissions dated 23/09/2024 and argued that it is out of order for the 1st proposed interested party to apply that the 2nd and 3rd proposed interested parties be enjoined to the suit without their instructions. That one must move the court by way of a formal application for enjoinment and neither the 2nd and 3rd proposed interested party has made such an application. He urged the court to let the Claimant and the Respondent proceed with mediation without interference from the 1st proposed interested party whose interest is political and subjective and has failed to satisfy the elements set out in the case of John Harun Mwau v Simon Haysom & 2 others; Attornye general & 2 others (2021)eKLR.

23. He submitted that the application is politically motivated as the counsel for the 1st proposed interested party still harbour bitterness after he lost the gubernatorial seat and the 1st proposed interested party has expressed interest in the gubernatorial seat. That the allegation that an advertisement of open positions was done to instil fear to the officers in the supply chain management is baseless since the issue of staffing is domiciled in county public service board and in case of violation of an employment right, the same should be addressed in the appropriate court. That the prayer by the 1st proposed interested party to have the mediator supply all documents and pleadings presented during mediation process is a violation of Rule 25(1) and (3) of the Rules. It is submitted that the application is an abuse of the court process as it is purely political based on the sentiments the 1st interested party and his counsel have been making in public.

24. I have carefully perused and considered the application as well as the responses thereto. I have similarly perused and considered the rival submissions by the learned counsel representing the parties and the case law cited.

25. The brief history of the matter is that the Claimant and the Respondent herein entered into a private mediation process that saw the signing of a mediation agreement dated 14/06/2024 and filed in court on 21/06/2024. One Francis Karoki, the mediator moved this court vide a notice of motion application dated 28/06/2024 seeking for orders that the mediation agreement be adopted as a judgment of the court. Consequently, the 1st proposed interested party filed the application herein seeking for orders that the interested parties be enjoined to the suit, stay of adoption of the mediation agreement, leave to apply for setting aside of mediation agreement and that the mediator be compelled to supply the 1st proposed interested party with proceedings and evidence presented during mediation.

26. The issues for determination are, firstly, whether the proposed interested parties should be enjoined in the adoption proceedings, 2ndly, whether leave be granted to the 1st Proposed Interested Party to file an application for an order to set aside the private mediation Agreement dated 20/6/24 and lastly, whether the mediator be ordered to supply the 1st Proposed interested Party with all pleadings, documents, Materials, proceedings and any other evidence presented to him during the mediation process.

27. The Supreme Court in the case of Trusted Society of Human Rights Aliance -vs- Mumo Matemo & 5 Others (2015) EKLR defined an interested party as;

> " ...an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause."

28. The guiding principles for consideration before enjoinment of an interested party to a suit were again articulated by the Supreme Court in Raila Amolo Odinga & Another -vs- Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR where the court held that;

> " One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court, hence, sufficient grounds must be laid before the court, on the basis of the following elements:
>
> (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
>
> (ii) The prejudice to be suffered by the intended interested party in a case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
>
> (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court."

29. In the case of Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR, the court in a persuasive decision stated as follows;

> "In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than "merely being affected" by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case."

30. In this case, the 1st proposed interested party was not a party to the mediation process. He claims that he has brought this application on behalf of the people of Nyandarua to prevent misappropriation of public funds. His claim is based on the ground that the tendering process and the mediation agreement between the Claimant and the Respondent were irregular and an illegality ab initio. He has enjoined the 2nd and 3rd proposed interested parties who have not shown any interest in the matter since they did not file responses to the application. What the court is now tasked to determine is whether the reasons advanced by the 1st proposed interested party have established the threshold for him to be enjoined to the adoption proceedings.

31. The 1st Proposed Interested Party is the Senator Nyandarua County, and, indeed by his oversight mandate over the County Government, there is, in my view, no doubt that he has interest in public procurement activities in the county to ensure that any contract for goods or services in the said county are executed in accordance with fairness, equity, transparency, competitiveness and cost effectiveness as envisioned under Article 227 of *the constitution*. Within this background he fits in as a proper interested Party.

32. I hasten to add however that, such interest must be predicated on sound factual basis and which must be prosecuted through the various laws and procedures providing for enforcement of rights.

33. So, is the Senator a proper interested party in this case? I have reviewed the basis upon which he wishes to be enjoined in these proceedings and be allowed to apply to set aside the Mediation Agreement before its adoption.

34. The Hon. Senator may be very well intentioned in serving the interests of the people of Nyandarua County by ensuring accountable use of public funds.

35. He has however, in my view, missed the target as he has adopted a procedure that literally leaves him in a jurisdictional quagmire. He acknowledges being aware of the initially impugned tender process which was cancelled. He asserts that a clandestine and illegal 2nd contract was entered into between the Claimant and the Respondent on 31/11/23.

36. Legal challenge to any public procurement process is elaborately provided for under the Public Procurement and Disposal Act and the primary jurisdiction is the repose of the Public Procurement Administrative Review Board. Such a dispute would only find its way to this court by way of the exercise of Judicial Review jurisdiction of this court provided in the *Public Procurement and Asset Disposal Act*.

37. It must be acknowledged that this court as presently constituted cannot legally undertake the herculean task of determining the propriety or lack thereof of the impugned procurement. Not that this court lacks the capacity so to do, but rather, that the court is not clothed with the necessary wherewithal to entertain the dispute as it has not been moved appropriately within the relevant law. The matter before me revolves around the narrow jurisdiction of adoption of a mediation agreement and not a determination whether the procurement in issue was legally sound.

38. Jurisdiction is everything and where a court of law lacks jurisdiction, it must down its tools. The source of jurisdiction was well captured by the Supreme Court in Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 where the court stated;

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law".

39. Therefore, much as the Senator has the legal mandate to articulate and defend the rights and interests of the people of Nyandarua, such defence must be mounted within the law and procedure provided.

40. If there be any fraud, such matter ought to be raised before the Public Procurement Review Board or alternatively, based on the nature of the complaint, to such other agencies such as EACC, DCI, Public Procurement & Regulatory Authority (PPRA).

41. No evidence of any active investigation on this procurement has been placed before the court. A lingering question would be what would be the end game even assuming leave was to be granted and the agreement was to be set aside?

42. It is noted that there was a general anonymous complaint over procurement in Nyandarua County written to Public Procurement Regulatory Authority. The 2nd Proposed Interested Party (EACC) is

also said to have been notified of the irregularity. It has not escaped the attention of this court that the 2nd and 3rd proposed interested parties are completely mute on the issues raised. No responses were forthcoming from their end.

43. In the end no evidence of active investigation of the matter is laid before the court and as alluded here before, this court cannot possibly turn itself into an investigator into the issues raised and the court can only actively deal with the matter should its judicial review jurisdiction be invoked as provided for under the *Public Procurement and Asset Disposal Act*, of course, subject to limitation of time.

44. In light of the above, the 1st Proposed Interested Party and indeed all the Proposed Interested Parties fail to achieve the necessary threshold to warrant being enjoined as Interested Parties.

45. That notwithstanding, I find it necessary to broach the question whether leave should be granted to the 1st proposed interested party to file an application for setting aside the private mediation agreement.

46. Rule 50 of the Rules provides for enforcement of private settlement agreement. It states as follows;

    (1) Where a party to a private settlement agreement that has been registered under rule 48 wishes to have the agreement enforced by execution or otherwise, he or she shall apply to the court in Form 16 as set out in the Schedule indicating the intention to do so.

    (2) The registry shall, upon receiving the application under sub- rule 1, open a separate file for the private settlement agreement.

    (3) The file opened under subrule (2) shall be placed before the court within fourteen days for adoption.

    (4) The court may order that other parties or the mediator be served, or that the applicant or other party be heard or examined on oath before adopting the private settlement agreement, or make such order as it may deem necessary.

    (5) Where the court is satisfied that the private settlement agreement is duly signed meets the conditions specified in rule 46, the court may adopt it as a judgment of the court and issue an order or decree in the terms of the agreement.

    (6) A party who executed a private settlement agreement but who was not heard before its adoption by the court, or any other affected party, may, with leave of court, apply to set aside the adoption proceedings or resultant orders. (emphasis added)

    (7) An aggrieved party may, within fourteen days, appeal against the order of the court made under subrule (6) but no appeal shall against the private settlement agreement itself or the contents thereof.

47. Once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements are in the nature of consents and in the cases of Flora N. Wasike vs Destimo Wamboko [1988] eKLR and Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR, the common thread was that a consent could not be set aside or varied unless it was 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 or for reason which would enable the court to set aside an agreement.

48. Rule 50(6) of the mediation rules provides that a party who executed a private settlement agreement but who was not heard before its adoption by the court, or any other affected party, may, with leave of court, apply to set aside the adoption proceedings or resultant orders. (emphasis added)

49. Rule 39 of the Rules provides for setting aside of an 'order or decree' arising out of a settlement agreement. It states that;

(1) No application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of court.

(2) An application for leave under subrule (1) shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely in setting aside the order or decree.

(3) The following shall constitute the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement—

(a) misconduct, fraud, or a fundamental mistake by the mediator as relates to the mediation proceedings that goes to the core of the matter:

Provided that the misconduct, fraud or mistake should not have been known by the applying party at the time of execution of the settlement agreement and should be one which affected the process and outcome of the mediation in such a way that it would be unfair and inequitable to enforce it in its form;

(b) fraud, collusion, or misrepresentation by any party to the mediation (other than the party applying) or any witness or person who took part in the proceedings and whose participation materially affected the outcome;

(c) a fundamental mistake by any or all of the parties to the mediation as to the existence or state of the subject matter, person or thing; or to any set of facts that materially affected the parties' decision to enter into the subject agreement and which has rendered such agreement unfair and inequitable;

(d) where a party was, at the time of the making of the agreement, under some legal incapacity to take part in the subject mediation proceedings or to conclude and execute a binding settlement; or

(e) where the settlement agreement is invalid under Kenyan or international law, or is or has become incapable of enforcement under Kenyan law.

(4) At the hearing of an application to set aside an order or decree, no party shall, without leave of court, be allowed to canvass any other ground in support of the application other than the grounds specified in subrule (3).

(5) The court shall hear and determine an application under this on priority basis within thirty days after filing.

50. From a reading of the law, a party affected by a private settlement agreement has a right to apply to set aside the agreement. The distinction to be drawn here is that such setting aside is on the legal frailty under Rule 39 and 50(6) of the Mediation rules. It cannot, as this court has been invited to do in this case, involve the examination of the merit of a case of an applicant against parties to a mediation.

51. Any other party with a claim or interest against either or both parties in a matter settled through medication has the usual latitude to sue in the usual appropriate forum be it in the civil or criminal proceedings for redress. In such a situation, the most the court approached would do in the interests of justice is to invoke its inherent powers and entertain an application for stay of such adoption awaiting the 3rd party's enforcement of its rights over either or all the parties in the mediation.

52. I hasten to add, however, that such a stay would only be available to a party with active investigations/ proceedings before relevant state agencies or a court of law or tribunal of competent jurisdiction. The stay cannot be issued in a vacuum.

53. In regard to whether the mediator be ordered to supply the 1st Proposed Interested Party with all pleadings, documents, materials, proceedings and evidence presented to the mediator during mediation, it is worthy of note that confidentiality is central to the mediation process.

The proceedings are confidential as between the parties and between them and the mediator. In re Estate of BM (Deceased) (Civil Appeal 2129 & 1975 of 2015) [2019] KEHC 12369 (KLR) the court stated that;

> All information obtained orally or in writing in the course of mediation is treated confidentially, and cannot be used in evidence thereafter."

54. This is in line with rule 25 of the Rules which states that;

(1) Any person taking part in a mediation process under these Rules shall be required by the mediator to execute a confidentiality agreement and shall be bound by the terms of such agreement.

(2) The confidentiality agreement shall be in Form 10 as set out in the Schedule.

(3) Any communication during mediation including the mediator's notes shall be confidential and shall not be admissible in evidence in any ongoing or subsequent legal proceedings.

(4) Any person taking part in a mediation process shall maintain the confidentiality of any information obtained during the mediation and not disclose that information unless—

(a) that person is required by law to disclose the information; or

(b) the information relates to child abuse, child neglect, defilement, domestic violence, a sexual offence or any related criminal or illegal purpose.

(5) The court shall put measures in place to guide the procedure on the making and processing of disclosures under subrule (4).

(6) Subject to subrule (4), the mediator or any person present or appearing at a mediation session may not be summoned, compelled or otherwise required to testify or to produce records or notes relating to the mediation in any proceedings before any court of law.

55. I take the view that even where the mediation agreement involves a public body as is in this case, the confidentiality applicable in the mediation process is applicable and such information may not be used in evidence in any ongoing or subsequent legal proceedings.

56. The rationale is easy to see. An affected party need not be put in the picture of the negotiations and proceedings in a mediation process. Rather, it is for an alleged affected party to demonstrate a clear basis of how the mediation settlement adversely affects it and thus seek orders to set aside the agreement based on its cause of action against either one or all the parties in a mediation agreement such cause of action not being dependent on what the parties agreed giving rise to the mediation settlement agreement.

57. In view of the above even had the prayer for leave sought been granted the prayer that the mediator be ordered to supply the 1st Proposed interested Party with all pleadings, documents, materials,

proceedings, and, any or further evidence presented to him during the mediation process would not have seen light of day.

58. From the foregoing and for reasons above stated, the application before court lacks merit. Same is dismissed in its entirety. Each Party is to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER 2023

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A.K. NDUNG'U

JUDGE