



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE 21 OF 2015

NKM.....PLAINTIFF/RESPONDENT

VERSUS

SMM.....1ST DEFENDANT/APPLICANT

JMK.....2ND DEFENDANT

RULING.

1. The 1st Respondent in this Matrimonial Cause has filed an application by way of Notice of Motion brought under Section 3A & 63(e) of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules, seeking for an order to set aside/and or expunge from the Court Records the Mediation Settlement Agreement dated 3rd April, 2017 and set the matter down for hearing.

2. The application is premised on the grounds that:

- i. The court appointed mediator failed to decide the dispute as pleaded in the plaint and defence and waded into extraneous issues outside what was before the court.
- ii. There was no agreement by the parties and the mediator totally failed to use her expertise to make parties agree on all matters.
- iii. It will be unfair for the Plaintiff to proceed with the hearing of the part which is favourable to her as she refused to settle on parts which are favourable to the Applicant.
- iv. The Applicant will be greatly prejudiced if a hearing is held for part of the property and not the entire dispute.

3. The application was supported by his supporting affidavit dated 15th March, 2018. It is claimed that the Applicant was aggrieved by the decision of the Mediator issued on distribution of properties between the parties. He avers that he attended the Mediation session where the Mediation Settlement Agreement was prepared and agreed upon between the parties.

4. The Applicant pleaded that a term of the agreement was that he was not to dispose of the properties acquired during coverture and that, the Plaintiff/Respondent would continue occupying Parcel LR No. [particulars withheld] on one hand and he would occupy Parcels No. Mwala/Kyawango/[xxx], [xxx] and [xxx] on the other hand without any interference from the Respondent.

5. It is the Applicant's case that he signed the Mediation Settlement Agreement in belief that the matter had been fully settled. That, when the matter came to court, on 15th February, 2018 the Plaintiff's counsel abandoned the Mediation Settlement Agreement and insisted on having the matter set down for hearing for paragraph 7, which related to the property in Mwala that he occupies.

6. He contends that he was tricked into signing the Mediation Settlement Agreement which granted the Plaintiff an unfair share of the property. It is his case that if the matter proceeds as it is, he will be greatly disadvantaged as the properties given to the Plaintiff are worth over Kshs. 50,000,000/= whereas what is in dispute is property worth Kshs. 3,000,000/=. He prays for the entire Mediation Settlement Agreement to be set aside and the suit do proceed to hearing as a whole.

7. The application was emphatically opposed by the Plaintiff/Respondent who relied on the replying affidavit dated 15th May, 2018. It was contended that the Mediation Settlement Agreement was acceded to by all parties with the Applicant herein acting in person and it was left upon either party to move the court. That on 21st September, 2017, the agreement was adopted as an order of the Honourable Court.

8. That, it was the court that gave directions for the matter to be set down for hearing on issues not resolved at mediation. She further

contended that, if the Applicant was not satisfied with the terms of the agreement, he should have never agreed to execute it, before it was adopted.

9. On the issue of the value of the properties, the Respondent insisted that the market value lacked any basis and was never a reason for her injunctive prayers sought in the suit. It was averred that the Applicant was attempting to circumvent justice by delaying the determination of the main suit.

10. On 26th July, 2018, the Court directed that the application be canvassed by way of written submissions. The Respondent filed written submissions but the Applicant has failed to file written submissions despite the court extending time on several occasions.

11. The Respondent submitted that the consent order was 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. It was submitted that the consent order was entered into voluntarily by all parties including the Applicant and not through fraud or misrepresentation as alleged.

12. Further, that the consent order was arrived at after parties undertook the mediation process. Throughout the mediation proceedings parties agreed on some issues and the outstanding issue was left for the court's determination. That, the Applicant voluntarily executed terms of the mediation which were captured in a Mediation Settlement Agreement which was later adopted by the court.

13. The Respondent tasked the Applicant to establish the conditions necessary to review a consent order; such as material non-disclosure, fraud/misrepresentation, mistake, undue influence or other supervening events all which are necessary to invalidate the order. It was submitted that there was no indication whatsoever from the proceedings or by the conduct of the parties that the aspects of setting aside of a consent order had been demonstrated.

14. The 1st Respondent relied on the following cases:

- i. Blue Bells Foods Limited v Daystar University & Another [2016] eKLR
- ii. Flora Wasike v Destimo Wamboke [1988] 1 KAR 625 at page 626
- iii. Pastor Antony Makena Chege v Nancy Wamaitha Magak & Another [2015] eKLR

15. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issue for determination is whether the application meets the threshold for setting aside the consent orders.

16. The guiding principles used by courts in setting aside consent judgments or orders are well established. In **Flora N. Wasike v Destimo Wamboko [1988] eKLR Hancox, JA**, as he then was, said:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or certain conditions remained to be fulfilled which are not carried out”

17. This position is clearly articulated in the English Case of **PURCEL V. F. C. TRIGELL LTD. (trading as SOUTHERN WINDOW AND GENERAL CLEANING CO. and Another)**, [1970] 3 ALL ER671, where Winn, LJ, opined:

“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

18. In **Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KIR 485**, it was held that an order entered into by consent 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 representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

“The marking by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.”

19. The consent herein was entered into on 21st September, 2017 after the court adopted the Mediation Settlement Agreement dated 3rd August, 2017 on the mode of distribution of various assets. The Mediation Settlement Agreement was reached after the main suit was referred to mediation. Parties filed their case summaries and a mediator was appointed to assist in the mediation process.

20. Subsequently, the sessions culminated in the execution of a Mediation Settlement Agreement which has been presented as evidence. The Mediation Settlement Agreement was later adopted by this court as a consent order.

21. During the whole process, the Applicant was acting in person and signed on his own accord. The Respondent was represented by counsel. There is nothing on record to show any limitation on the part of the Applicant or on the authority of the mediator to adequately

assist the parties to reach a settlement in the matter.

22. The terms agreed upon and adopted by the court for the Mediation Settlement Agreement on the parcels of land were that:

- i. The Respondent was to occupy Avenue Estate house on parcel Nairobi L.R. No[particulars withheld];
- ii. Parcels no. Kajiado/Kaputei central /[particulars withheld], Kajiado/Kaputei central /[particulars withheld] and Kajiado/Kaputei central /[particulars withheld] are subject to litigation in Machakos Civil case No 299 of 2012. The Applicant and the Respondent shall be entitled to equal and shared ownership thereof.
- iii. Both parties shall be entitled to an equal share in respect of compensation received from the Government on compulsory acquisition of parcel no. Kajiado/Kaputei central /[particulars withheld].
- iv. Parties were unable to agree on the issues relating to properties in Mwala known as Mwala/Kyawango/478, 493 and 494 and were at liberty to move the court on the said 3 properties.

23. The Applicant contends that he signed the Mediation Settlement Agreement in the belief that the matter had been fully settled. Further that, the Respondent’s counsel’s decision to abandon the agreement and request the court to set the matter down for hearing in relation to the properties in Mwala which he occupies was to his detriment. From a perusal of the record, it is clear that the Mediation Settlement Agreement supplied and adopted as an order of the court was in partial settlement of the issues arising. Paragraph 7 reads:

‘The parties are unable to agree on issues relating to the properties in Mwala known as Mwala/Kyawango/[particulars withheld] and Mwala/Kyawango/[particulars withheld] and Mwala/Kyawango/[particulars withheld] and the parties are at liberty to move the court as they deem necessary with regards to the said 3 properties’

24. From the extract, it is clear that the settlement adopted was partial and the Applicant’s argument that he believed it to be a full settlement is not correct. The Plaintiff’s counsel did not abandon the Mediation Settlement Agreement in having the matter set down for hearing.

25. The Applicant also stated that he was tricked into signing the Mediation Settlement Agreement which granted the Plaintiff an unfair share of the property. He averred that the properties given to the Plaintiff are worth over Kshs. 50,000,000/= whereas what is in dispute is property worth Kshs. 3,000,000/=. On her part the Respondent asserted that in no way was the difference in the value of the properties a determining factor in the parties reaching a partial settlement on distribution of properties.

26. From the record, no evidence has been adduced by the Applicant to prove the existence of any deception, or trickery by the Respondent during the mediation process. The argument raised is feeble as he is also an owner of the properties distributed. As such he was well aware of the value attached thereto before and during the whole process. He cannot claim ignorance of facts well within his realm of knowledge.

27. The purpose of this court is to determine whether the settlement agreement adopted 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 or in general for a reason which would enable the court to set aside an agreement or consent judgment. See Justice Harris, J, (as he then was) ,in **Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (Supra)**

28. The Applicant has not proved the existence of any of the ingredients which would merit the setting aside of the consent orders, arrived at with his full participation.

29. Reasons wherefore the Court finds that the application is lacking in merit and is consequently dismissed with no orders as to costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF FEBRUARY 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of Advocate for the Respondent

In the presence of for the Applicant