



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 1312 OF 2001

JOHN WANJOHI T/A METRO LABORATORIES.....PLAINTIFF/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 17th October 2008, brought under the provisions of; Article 159(2)(d) & (e) of the Constitution of Kenya, Sections 3A, 79G & 95 of the Civil Procedure Act, Order 45 Rule 1, and (3) of The Civil Procedure Rules 2010, and all other enabling provisions of the law.
2. The Applicant is seeking for orders that the Honourable court be pleased to vary, rescind or set aside its orders of 4th September 2017 and quash the entire purported mediation proceedings and any resultant agreement and the matter proceeds to full hearing of the suit. The costs of the application be provided for.
3. The application is premised on the grounds on the face of it and an affidavit dated 15th October 2018, sworn by the Applicant John Wanjohi. He deposed that, sometimes in 2001, the Plaintiff entered into a contract with the Ministry of Water Resources Management and Development, for the supply of Water Treatment Chemicals. That after the Plaintiff commenced the supply the Defendant terminated the tender without notice.
4. The Plaintiff then filed this suit on the ground of breach of contract and non-payment of the contract in the sum of Kshs. 57,489,755 and was awarded the sum plus interests and costs. However the Respondent challenged the decision vide Civil Appeal No. 290 of 2014. The Court of Appeal ordered for a re-trial as it was unable to make a conclusive determination of the matter, particularly on the terms of the contract that had been breached and by which party as there were crucial documents missing in the record of Appeal.
5. The matter was referred back to the trial court where upon it was screened for mandatory mediation by the Mediation Deputy Registrar pursuant to Rule 4 of the Mediation (pilot project) Rules 2015 and a notice dated 20th June 2016 served upon him. That the first session of the Mediation Reference Number 45 of 2016 was scheduled on 4th October 2016, but did not proceed as the Respondent did not have proper and firm instructions on the conduct of the matter and it was adjourned to 31st October 2016.
6. On that date, the Mediation failed to take off once more as the Respondent again pleaded lack of proper and firm instructions on the conduct of the matter and the next session was scheduled for 1st February 2017. The Applicant avers that, by this time, he was anxious that the Respondent was indeed not ready to mediate and settle the matter and was intent to have time for mediation run out without the parties reaching any settlement.
7. On the said 1st February 2017, the Mediation failed to take off once more at the instance of the Respondent who requested that the Applicant agree to have the Mediation session adjourned one last time as the Respondent did not have the instructions on the conduct of the matter yet. The matter was adjourned to 27th February 2017.
8. However, the adjournment prompted an email from the appointed Mediator one Calvin Nyachoti, who cautioned that the Mediation was already outside the stipulated time provided for by the Mediation (Pilot) Project Rules. On 23rd February 2017 the Applicant received a letter from the Respondent addressed to the Mediation Deputy Registrar, disputing the choice of Calvin Nyachoti as the appointed Mediator and a subsequent letter dated 8th May 2017, received on 23rd May 2017 from the Respondent forwarding the name of; one Ms. Maria Goretti as the preferred Mediator.

9. That the change of mediator by the Respondent was a delay tactic by the Respondent to stretch out the dispute even further and delay the fruits of the Mediation. The choice of Ms. Maria Goretti was not discussed by both parties. The Respondent made an arbitrary choice in deciding on her as the Mediator without any regard to the Applicant's preference, but the decision was not challenged nor questioned by the Mediation Deputy Registrar.

10. On the 22nd May 2017, the Applicant received a letter from the Principal Secretary of the Ministry of Water and Irrigation informing him that, the Ministry did not appreciate a consent proposal he had forwarded earlier and that, the Ministry was not interested in entering a consent and that was the reason why they had forwarded the name of Ms. Goretti Nyariki as a Mediator of choice. That from the tone set in the letter, the Respondent clearly did not regard him as an equal party in the Mediation proceedings and the intent of having Ms. Goretti as the choice Mediator was to have an undue advantage in the negotiations at hand.

11. On the 6th July 2017, the Applicant received another letter from the Permanent Secretary of the Ministry of Water and Irrigation addressed to the then Solicitor General Mr. Njee and copied to him informing him that, the Ministry was proposing to settle the dispute at Kshs. 25,239,500 as the final and full settlement of the matter. The letter indicated that if he was adamant and insisted that calculation of interest be done while paying him the amount proposed then the offer would automatically be withdrawn. The Applicant avers the letter was high handed and the nature of it was threatening to him and aimed at compelling him to settle the matter at a loss even though they were undertaking purported mediation.

12. On the 21st July 2017, he bowed down to the pressure by the Respondent and agreed to settle the matter as per the Respondent's proposal of Kshs. 25,239,500. However, he also requested that the Respondent pay him special damages of; Kshs. 12,062,000 and the costs of the claim be agreed upon. On 31st July 2017, the Permanent Secretary responded to his letter and informed him that the Ministry wished to reiterate the contents of its letter dated 6th July 2017, to the effect that the amount payable to him was the full and final payment at Kshs. 25,239,500.

13. He avers the above facts detail the circumstances under which the purported Mediation Settlement Agreement dated 4th September 2017 and decree dated 12th September 2017 was reached, even though he incessantly tried to get the Respondent to change their offer and give him a better offer, as the amount that was being offered was oppressively low and would not cover the debt he had incurred in the pursuit of compensation for the breach of contract.

14. Thus the Mediation was a sham and in fact there was no mediation between the parties except for the Respondent's high handed behavior from the start which denied him any negotiating power whatsoever. The Respondent took advantage of his desperation and bad financial situation having been in court over the said subject matter for at least fifteen (15) years seeking compensation and justice.

15. However, the Defendant (herein "the Respondent") filed grounds of opposition dated 30th November 2018 and averred that the application has been brought after undue and unreasonable delay contrary to the provisions of; Order 45 of the Civil Procedure Rules 2010. It has been filed more than a year after the impugned order dated 4th September 2017 was made.

16. That the Applicant has not demonstrated the discovery of an important matter or evident which was not in its knowledge or could not be produced at the point of the order dated 4th September 2017 was made and decree dated 12th September 2017 extracted. The Mediation Settlement Agreement dated 4th September 2017 was entered into between the parties willingly and executed by the Applicant through its Counsel, whereupon the Claimant extracted the decree dated 12th September 2018 for an amount of Kshs. 25,239,500 which decree was fully satisfied.

17. The parties disposed of the application by filing submissions which I have considered. The Applicant invited the court to consider the following issues:

(a) Whether the purported mediation between the Applicant and the Respondent was conducted in accordance to the Mediation (Pilot project) rules 2015;

(b) Whether the mediation settlement agreement that gave rise to the consent judgment was valid;

(c) Who should bear the costs of the application

18. The Applicant submitted that, the purported Mediation between the parties herein was conducted in direct contravention of the provisions of the Mediation (pilot project) Rules 2015. That the Black's Law Dictionary, 8th Edition at page 1003 defines "Mediation" as; "a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."

19. Further, the process of appointment of a Mediator is clearly outlined under Section 6(2) of the Mediation (Pilot project) Rules 2015, which provides that:-

"For each case referred to mediation, the Mediation Deputy Registrar shall nominate three qualified mediators..... and notify the parties of the names of the mediators."

20. Further Section 6(3) states that:-

" parties shall within seven (7) days of receipt of the nominated mediators, state their preference in order of priority and shall file a notice with the Mediation Deputy Registrar."

21. The Applicant thus argued that the process of selection of a Mediator did not take place as required by the Rules. That Section 7 of the Mediation (Pilot project) Rules 2015, provides for the time limit of Mediation proceedings and states Mediation proceeding shall be concluded within sixty (60) days and may be extended for a period not exceeding ten (10) days.

22. That the matter herein was referred to Mediation division on 15th December 2015 and the mediation ended on 4th September 2017, approximately two years after the stipulated time limit, which is a complete violation of the Mediation (Pilot project) Rules 2015. The delay in conclusion of the Mediation sessions was as a result of the Respondent frustrating the process by their constant adjournments whenever the matter was scheduled for hearing.

23. It was submitted that, Section 14(1) of the Mediation (Pilot project) Rules 2015 provides that where there is an agreement resolving some of the issues in dispute, such agreement shall be in a prescribed Form 8, duly signed by the parties. That the Applicant protested and refused to sign the Mediation Settlement Agreement as the Respondent filed with the Mediation Deputy Registrar a form that was contrary to the Mediation (Pilot project) Rules 2015. Further the Mediation Settlement Agreement dated 4th September 2017, lacks the Applicant's signature which is a required provision under the Standard form provided for by the Rules.

24. Reference was made to the case of; Makula International Ltd vs His Eminence Cardinal Nsubuga & Another (1982) HCB 11, where the Uganda Court of Appeal held that; "...a court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings including admissions made thereon."

25. It was submitted that, the legal validity of a consent and principles on which it can be set aside were considered by the court of Appeal in the case of; Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd; Nairobi Civil Appeal No. 276 of 1997 wherein the court of Appeal applied the reasoning in the case of Flora Wasike vs Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated:-

"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."

26. Therefore the Applicant argued that, the process of Mediation that led to the consent order dated 4th September 2017 was marred with highhandedness, coercion and bias from the Respondent whose aim was to induce and compel the Applicant to sign the Mediation Settlement Agreement that would favour the Respondent.

27. That the court in the case of; Mamta Peeush Mahajan (suing on behalf of the estate of the late Peeush Premal Mahajan vs Yashwant Kumari Mahajan (sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishna Lal Mahanjanj (2017) eKLR, said on the issue of duress/coercion stated that "duress essentially occurs where a party to contract has coerced the other and exercised domination as to undermine the others independence of decision substantially. It is all about illegitimate or unlawful pressure and where proven, the related contract is deemed voidable."

28. The Applicant submitted that, the claim was for Kshs. 57,489,755 with interest and costs for over 15 (fifteen) years adding up to about Kshs. 340,000,000, therefore the offer of Kshs. 25,239,500 was extremely too low in the circumstances. That at the time when the Respondent offered the sum of Kshs. 25,239,500, he had a financial crisis which he raised with the Respondent which situation the Respondent took advantage of to insist on settlement at the said oppressive sum.

29. The Applicant referred to the case of; Kenya Commercial Finance Company ltd vs Ngeny & Another (2002) 1 KLR, where it was stated:-

"The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."

30. Further the court of Appeal in Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited (2014) eKLR, stated on the issue of unconscionability as follows:-

"Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair."

31. Further in the case of; Birket V. Arcon Business Machines Ltd (1999) 2 All ER 429, the court of Appeal in England held that:-

"If a transaction was on its face manifestly illegal, the court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the court might refuse to enforce it even if illegality had not been pleaded or alleged. The principle behind the court's intervention of its own notion in such a case was to ensure that its process was not being abused by an invitation to enforce sub silentio a contract whose enforcement was contrary to public policy."

26. Further in the case of; Wangechi vs Kimita & Another vs Mutahi Wakibiru (1982-88) 1 KLR 977, the court observed that the words, "any other sufficient reason" in the provision of; Order 45 (1) of the Civil Procedure Rules 2010, need not be analogous with the other ground in the Order. It is therefore not confined to the other kinds of reasons specified in the Order. That view was affirmed in the case of; Shanzu Investments Ltd vs Commissioner of Lands, CA No. 100 of 1993 where the court stated that the provision under consideration confers on the court unfettered discretion to review its own decrees or orders for any sufficient reason.

27. Finally, the Applicant submitted that in awarding costs, the principle guiding the courts has been that “costs follow the event” which is derived from the provisions of Section 27 of the Civil Procedure Act. “The event” is that, the unsuccessful party will be ordered to pay the costs of the successful party. Further the court has discretion as to who pays costs, the amount thereof and when they are to be paid. The discretion must be exercised judicially. It must not be exercised arbitrarily but in accordance with reason and justice.

28. However, the Respondent submitted that, the scope of review as set out in Order 45 of the Civil Procedure Rules 2010 and is underpinned by the decision of the court in the case of; Sadar Mohamed vs Charan Singh & Another (1963) EA 557 wherein the court stated; “any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.”)

32. It was submitted that, firstly, it must be noted that the appointment of the Mediator was done in accordance with the provisions of the Mediation Pilot Rules 2015, whereupon person appointed as Mediator were persons duly accredited by the Mediation Accreditation Committee. More importantly, the Applicant was fully aware of the appointment of the Mediator and at no point until the present application did the Applicant ever raise or otherwise object to the appointment.

33. Further, the Applicant was fully represented by counsel throughout the Mediation exercise, whereupon conclusion of the Mediation, the Mediation Agreement was executed by all parties. In fact, pursuant to the Mediation Settlement Agreement, a decree was extracted and the Applicant duly paid the amount of Kshs. 25,000,000 in accordance with the terms of the agreement. That in view of the foregoing, the application dated 17th October 2018 does not only satisfy the grounds for review but is also insincere and an abuse of the court process.

34. That the application does not demonstrate any injustice suffered by the Applicant following the Mediation, if anything, the terms of the Mediation Settlement Agreement were followed to the letter with the Applicant receiving the amount of Kshs. 25,000,000 as per the agreement. Further, in making the application for review, there is a requirement under; Order 45 of the Civil Procedure Rules, the application has to be made without unreasonable delay.

35. That in the case of; Mbogo Gatuiku vs Danson Mwaniki & 2 Others (2011) eKLR, the Honourable court pronounced itself on the matter of delay in bringing an application for review as follows:-

“in sum this medical explanation the applicant has endeavored to place before the court to explain why he has taken over 21 years to bring this review application, is rejected. It is not only for a long period of delay that a party needs to give an explanation. Even a day or two calls for an explanation. In this case and without going into the merits of the application, the court dismisses it on the basis that it took too long to file it.”

36. I have considered the arguments by the parties and the submissions filed. I find that there is no dispute that the Applicant filed the suit herein seeking for a sum of Kshs. 57,489,750. He was awarded the same but the Respondent challenged the judgment in the court of Appeal. The court then ordered that the matter be referred back to the High court for retrial. Subsequently, the matter was screened and referred to Mediation. It is out of this mediation that a settlement order was made in which the Applicant was awarded Kshs. 25,239,500.

37. To recap the grounds upon which the Applicant seeks to set aside the mediation settlement consent, it is averred inter alia that;

(a) Selection of the mediator was fraud;

(b) The mediation was not concluded within the stipulated sixty (60) days;

(c) The settlement consent was not in the provided format and that the Applicant did not sign the form containing the settlement.

38. As already stated herein, the Respondent denies all the above allegations and in a nutshell submits that the Mediator was appointed by consent of the parties. However it suffices to note that the Applicant was represented throughout the Mediation process by a legal counsel and the consent was signed by both parties.

39. Be that as it were, the record shows that, the matter was screened for mediation on 22nd June 2016 and parties notified of the same vide a letter of the same date signed by the Honourable the Deputy Registrar. The parties were given seven (7) days within which to file case summary from the date of receipt. The notice was received by the Applicant’s counsel on 4th July 2016 and by the Respondent’s counsel on 30th June 2016. The Honourable Deputy Registrar appointed Mr. Calvin Nyachoti to mediate the dispute between the parties. He then send a notice to the parties dated 1st September 2016, requiring them to file a case summary within seven days. Apparently there does not seem to have been any mediation conducted thereafter as is evident from a an email dated 31st January 2017, from Mr. Calvin Nyachoti to the parties informing them that, the mediation was already outside the time stipulated in the mediation (Pilot project) Rules 2015 and that the parties should expedite resolution of the dispute or determine otherwise. The mediation was then rescheduled to 27th February 2017.

40. Subsequently the Honourable Deputy Registrar sends an email to the parties to appear before her on 23rd March 2017 for mention of the matter. This mention was in response to a mail dated 3rd March 2017, by the Respondent seeking to be involved in the appointment of the Mediator. As a result and after meeting the parties, the Honourable Deputy Registrar on 30th March 2017 send the parties a list of three Mediators. In the meantime Mr. Calvin Nyachoti referred the matter back to the Deputy Registrar vides a letter dated 20th March 2017.

41. From the letters dated 22nd May, 6th July, 21st July and 31st July 2017, the parties engaged in correspondence on settlement of the matter. By that time, the Respondent had forwarded the name of Ms. Mary Gorrety Nyariki as a preferred Mediator. The court record shows

that, the Honourable Deputy Registrar appointed Ms. Gorrety through a letter dated 24th April 2017. The Mediator acknowledged the appointment vide an email dated 21st May 2017. Subsequent Mediation session was held on 15th June 2017.

42. In the meantime, the parties exchanged correspondence as aforesaid to negotiate the settlement of the dispute. The Respondent offered the Applicant a sum of Kshs. 25,239,500 as a full and final settlement of its claim. The Applicant was amenable to the sum offered and sought for additional sum of Kshs. 12,062,000 as special damages. The Applicants did not concede to the payment of the special damages. Eventually, on 4th September 2017, a mediation settlement agreement was entered and adopted as a judgment of the court and the decree dated 12th September 2017 extracted there from.

43. From the above chronology of events, I find that the appointment of the Mediator was properly in accordance with the provisions of Section 6 of the Rules. The Applicant did not object to her appointment and neither did he suggest a different Mediator. He attended the Mediation session without raising any objection

44. On the issue of how long the Mediation took, I find that the Mediation commenced on 15th June 2017 and the Mediator had sixty (60) days within which to conclude the matter. The same should have concluded by 15th August 2017. The agreement was executed on 4th September 2017. This was outside the sixty (60) days period provided for under Section 7 of the Rules. However, both parties signed the settlement agreement as per the copy in the court file produced by the Applicant as Exhibit "JW009" Further as aforesaid, the Applicant was represented by a lawyer throughout the proceedings. Subsequently the agreement was the consent adopted by the court and a decree extracted. The Applicant has already drawn a benefit by accepting the payment of 25,239,500. He was paid over a year ago and has come to court one year after the consent to retract the consent.

45. Even if the court were to find that the Applicant was subjected to undue influence/coercion and /or intimidation, to be granted the orders sought the Applicant must, first and foremost relinquish the benefit from the consent and go back to the status before the consent. Indeed Section 16 of the Rules clearly states that, the judgment founded on Mediation cannot be set aside. The intention was to give finality Mediation process. Indeed the consent entered into herein creates a contractual relationship between by the parties and are bound by it.

46. In the given circumstances I find that, the application has no merit and I dismiss it. In view of the fact that this was a consensus agreement and the rebate already given to the Respondent in the Mediation Settlement Agreement I will not award the Respondent costs of the application.

47. Those are the orders of the court.

Dated, signed and delivered in an open court this **14th day of October 2019.**

G.L. NZIOKA

JUDGE

In the presence of:

No appearance for the Applicant

Ms. Nthiga for Mr. Kihara for the Respondent

Dennis -----Court Assistant