Kioko v Mutisya (Environment and Land Appeal E051 of 2021)
[2025] KEELC 6741 (KLR) (7 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6741 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E051 OF 2021

AY KOROSS, J

OCTOBER 7, 2025

BETWEEN

JAMES MUTUNGI KIOKO ..... APPELLANT

AND

MARY MUMBUA MUTISYA ..... RESPONDENT

(Appeal from the ruling of Hon. A.G. Kibiru CM, delivered on 15/12/2021 in Machakos CM's Court ELC Case No. E109 of 2019 (Mary Mumbua Mutisya versus James Mutungi Kioko, Simon Mutungi Wambua & the Land Registrar, Machakos)

JUDGMENT

Background

1. The appeal before this court is challenging the decision rendered by the trial court, and to put the impugned ruling rendered on 15/12/2021 and the appeal in context, it is necessary to highlight the subject matter of the dispute that was before the trial court and now before this court.

2. The appellant and respondent are respectively husband and wife, and during their marriage, the respondent filed a suit against the appellant and his co-defendants, who are not parties to the appeal. While this matter was pending, their marriage broke down. Consequently, and by mutual agreement, they sought the services of Senior Counsel Kioko Kilukumi, a qualified mediator, to assist them in reaching a mediation settlement. This settlement would not only resolve various pending cases between them (excluding the divorce case) but also distribute their matrimonial properties.

3. Indeed, and as outlined in Section 59D of the *Civil Procedure Act* (CPA), a full mediation settlement agreement ["agreement"] was entered into by the parties on 5/03/2019, which was in writing. One of the terms of the agreement, as stated in paragraph 6 as read with Schedule 3, was that the lower court suit subject to this appeal would be withdrawn. Specifically, paragraph 6 states: 'All disputes pending

in court except the divorce proceedings whose details appear in Schedule 3 to this agreement shall be withdrawn with no order as costs.'

4. Following the provisions of Section 59D of the CPA, the appellant filed the motion dated 13/07/2021 seeking the striking out of the lower court suit and the adoption of the agreement as a court decree.

5. The motion was based on the grounds, inter alia: a) the proceedings were settled and compromised by the appellant and respondent through an agreement; b) the agreement distributed all matrimonial properties, including the suit properties herein; c) the agreement stipulated that the proceedings shall be withdrawn unconditionally; d) the agreement was a valid and binding consent contract enforceable by the court through the doctrine of specific performance; e) despite demand and notice being given for the withdrawal of these proceedings as mutually agreed, the respondent refused to comply and intended to continue and prosecute the proceedings, thereby prejudicing and causing loss to the appellant; lastly, f) the continuation and pursuit of the suit by the respondent was against judicial policy and the constitutional order. The motion was also supported by an affidavit sworn by the appellant detailing his grievances.

6. With the exception of the Land Registrar, Machakos, who was the 3rd defendant, all the other parties involved in the trial court proceedings responded either in support of or opposition to the motion. In her affidavit in opposition, the respondent raised several grounds and digressed into issues that were not relevant to the trial court proceedings, such as the parties' marital status and child maintenance, among others.

7. While bearing in mind that this court or the trial court does not have jurisdiction over divorce cases or the maintenance of children, this court will only highlight the substantive grounds relevant to matters concerning Environment and Land. With this in mind, she stated that the agreement was unenforceable because it was entered into under duress, she was suffering from depression, and it was marred by fraud and misrepresentation.

8. On his part, James Mutungi Kioko, who was the 2nd defendant in the trial court, deposed an affidavit on 24/08/2021, in which he supported the motion and maintained he was privy to the agreement that settled the dispute before the trial court, as the agreement was final, complete, and a binding contract. A further affidavit was filed by the appellant, which rebutted the respondent's assertions and largely reiterated the contents of his supporting affidavit.

9. Upon considering the parties' written submissions, the impugned ruling dismissed the appellant's motion dated 13/07/2021, finding no merit in it, and dismissed it with costs, abiding by the outcome of the main suit.

Appeal to this court and the hearing

10. This decision did not sit well with the appellant and aggrieved, and in exercise of his right to appeal, he invoked this court's jurisdiction by filing a memorandum of appeal dated 27/12/2021 and filed on 28/12/2021. This was later amended by an amended memorandum of appeal dated 30/10/2023, in which he raised the following grounds and faulted the learned trial magistrate for erring in law and fact by:

    a. Dismissing the appellant's motion dated 13/07/2021.

    b. Failing to recognise that a mediation settlement is obligatory on parties to perform and until set aside on grounds of fraud, mistake, illegality, misrepresentation, duress, coercion, unconscionability and undue influence.

c. Failing to consider the provisions of Articles 50 and 159 (2) (c) of *the Constitution*, Section 59 (B) of the *Civil Procedure Act*, Order 25 Rule 2 and 5(1) of the Civil Procedure Rules and paragraph 12(B) of the Judiciary Mediation Manual.

d. Not fully addressing himself to the contents of the agreement.

e. Ignoring the law in favour of the respondent to the detriment and prejudice of the appellant, and manifested bias against the appellant.

f. Failing to exercise his discretion judiciously and failing to consider all relevant facts.

11. Accordingly, the appellant urged this court to allow the appeal, set aside the impugned judgment in its entirety with costs, grant the motion, and award him the costs of the trial court suit and this appeal.

12. This matter was brought before this court for hearing, and as directed by the court, it was canvassed through well-articulated written submissions received from the law firm of Ms. Omollo & Co. Advocates for the appellant, dated 25/03/2025. However, despite Mr. Mutava for the respondent being granted additional time to submit his written submissions, none have been filed at the time of writing this judgment. Therefore, if they are filed later, the court will regard them as having been submitted out of time.

Issues for Determination, Analysis, and Determination

13. This being a first appeal, this court's duty is enshrined under Order 42 Rule 32 of the Civil Procedure Rules, and its role is to re-evaluate the evidence and draw factual inferences to reach its own independent decision. This duty has been affirmed in several court decisions, including Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR), where it was held that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

14. Accordingly, this court has reviewed the amended memorandum of appeal, the record of appeal, the appellant's submissions, the relevant legal provisions, and the authorities cited therein. Thus, in this court's humble opinion, this appeal will be determined by addressing a single issue: whether a valid mediation settlement agreement existed before the trial court.

15. Regarding this issue, especially concerning the relevant provisions of our law on mediation as a mode of dispute resolution, it is important to note that the same is proclaimed in Article 159 (2) (b) of our Constitution, which mandates that the judiciary, as an organ of dispute resolution to be guided by the principle of promoting alternative forms of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution.

16. In this case, the parties preferred to resolve their dispute through a private mediation settlement agreement, which was presented before the trial court for adoption, recognition, and enforcement as required by Section 59D of the *Civil Procedure Act*. However, the trial court rejected it even before adopting it, for the following reasons contained in the impugned ruling: -

> " although the respondent/plaintiff has not denied that a settlement agreement was made, she has disputed the manner it was obtained. An agreement must be a meeting of the mind of

the parties involved. Where one party disputed that such an agreement was reached, there can never be said to an agreement."

17. We will revisit this reasoning later in this judgment, but for now, we shall focus on the prevailing law and jurisprudence regarding the subject matter of the appeal. When faced with similar circumstances, the Court of Appeal decision of Kibosia & 11 others v Chebelieni & another [2024] KECA 1269 (KLR), which considered a matter handled before the enactment of the Civil Procedure (Court-Annexed Mediation) Rules that came into force on 2/09/2022, stated as follows: -

> "In 2019 when this matter was referred for mediation, the operational guidelines were contained in the Practice Direction on Court Annexed Mediation (Amendment) 2018. The Practice Direction first came into force in 2017 before being amended in 2018. The Practice Direction revoked the Mediation (Pilot Project) Rules, 2015. Although counsel for the parties cited the Mediation (Pilot Project) Rules, 2015 and the Civil Procedure (Court-Annexed Mediation) Rules, 2022 in support of their submissions, those rules had either been repealed or had not been enacted during the period relevant to this appeal.
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> 17. Under rule 14 of the Practice Direction on Court Annexed Mediation (Amendment) 2018, no appeal was allowed against an order or judgment of the court arising from mediation. As we have already stated, the agreement was adopted as an order or judgment of the court on February 17, 2020. Pursuant to rule 12(b), any agreement filed with the Deputy Registrar or Magistrate or Kadhi was to be adopted by the court and was to be enforceable as a judgment or order of court. Such a judgment or order was shielded from appeal. There is no doubt, and both sides of the divide in this appeal accede to this position of the law, that upon adoption the agreement was regarded as a consent judgment.
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> 18. Unlike the Civil Procedure (Court-Annexed Mediation) Rules, 2022, which at rule 39(3) provides the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement can be made, the Practice Direction on Court Annexed Mediation (Amendment) 2018 did not have such a provision. In the circumstances we will have to fall back on the traditional grounds for setting aside an order or decree entered by consent. For purposes of record, the Practice Direction on Court Annexed Mediation (Amendment) 2018 was revoked by the Civil Procedure (Court-Annexed Mediation) Rules, 2022. It is important to observe that the entire proceedings in respect of the mediation that has given rise to this appeal were conducted under the Practice Direction on Court Annexed Mediation (Amendment) 2018."

18. Thus, it follows that the agreement between the parties herein established a binding contractual relationship, and that is why Section 59D of the *Civil Procedure Act*, which specifically provides for the enforcement of private mediation agreements, clearly states the following regarding the court's power when such agreements are presented before it: -

> "All agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court."

19. As held in the binding decision of Kibosia (Supra), pursuant to Rule 12(b) of the revoked Court Annexed Mediation (Amendment) 2018, the agreement filed through the motion was to be adopted by the trial court and was to be enforceable as a judgment or order of the court. This is because the agreement entered into created a contractual relationship between the parties, who were bound by it. The position of Kibosia (Supra) is not new, as evidenced by the following persuasive decisions:-

In Alios Finance Kenya Limited v Country Farms Limited [2022] KEHC 11012 (KLR), the court stated: -

> " 19. Notably, once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements were in the nature of consents. It is for that reason that this court considered the consequences and implications of entering a consent."

In re Estate of Oyosi Oyuoya (Deceased) [2021] KEHC 4881 (KLR), the court held: -

> " 26. Once the mediation agreement is signed, it becomes final and binding as to the disputes that have been amicably resolved. Under the Court Annexed Mediation, the Mediation Report is filed in court and is subsequently adopted as an order of the court. However, if the parties are unable to agree on the issues that had been referred to mediation, the Mediator files a Non-Compliance Report and the matter is then referred back to court for determination."

20. Guided by the law and established precedents, this court concludes that the learned trial magistrate erred both in law and fact by refusing to adopt the mediation agreement. In this court's humble opinion, such an adoption as a court judgment was necessary before the court could entertain any motion to set aside the agreement, much like a contract can be set aside. Even if this court is mistaken and it was permissible for the trial court to reject the agreement prior to its adoption, the key question remains whether the respondent presented and proved her advanced grounds to the required standards. In answering this, guidance on this matter is provided by the Court of Appeal decision in Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] KEHC 11 (KLR), which held that:

> " prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement."

21. Concerning the appeal before this court, the respondent challenged the mediation process on four grounds: that the agreement was entered into under duress, she was mentally incapacitated, and there was fraud and misrepresentation. Having raised these grounds, it was her responsibility to substantiate them by providing sufficient evidence and to demonstrate that the agreement should be set aside. After considering the ruling, it is the finding of this court that the trial magistrate made a grave error in failing to assess whether these grounds were proven to the required standards.

22. Nevertheless, since this is an appeal and the court has an opportunity to reassess and reappraise the evidence, and having re-examined the respondent's replying affidavit that laid out these grounds, this court finds that these grounds, as averred by the respondent, were either unsubstantiated or fell far short of the legal threshold.

23. As a starting point, the letter dated 22/05/2017 from * hospital indicates that the respondent was discharged on 6/06/2017, which was well before the parties signed the agreement. Furthermore, the nature of the illness is not disclosed. Consequently, it follows that she did not prove she was mentally incapacitated when entering into the agreement. The court so finds. The same applies to the grounds of fraud and misrepresentation, which, although stated, were neither detailed nor supported.

24. As regards the ground of duress, the Court of Appeal decision of Jayantilala Lalji Gandhi & another v Mavji Ruda [1986] KECA 85 (KLR), which has been relied upon by the appellant's counsel, defined it as:-

> " It is perfectly true that duress at common law is confined to violence to the person, or threats of violence, and I am content to adopt, the following extract from Chesire & Fifoot's Law of Contract, 8th Edition at page 281 as a correct statement of legal duress; sufficient to vitiate an agreement one side:-
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> 'Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. It is a part of the law which nowadays seldom raises an issue. That a contract should be procured by actual violence is difficult to conceive, and a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort. Thus to threaten an imprisonment that would be unlawful if enforced constitutes duress, but not if the imprisonment would be lawful. Again a contract procured by a threat to prosecute for a crime that has actually been committed, or to sue for a civil wrong, or to put the member of a trade association on a stop list, is not as a general voidable for duress."

25. This definition has a similar connotation to that of duress as contained in Black's Law Dictionary, 11th Edition, page 636, which defines it thus: -

> " 2. Broadly, a threat of harm made to compel a person to do something against his or her will or judgment; esp., a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition. Duress practically destroys a person's free agency, causing nonvolitional conduct because of the wrongful external pressure...The use or threatened use of unlawful force-usu.that which a reasonable person cannot resist-to compel another to commit unlawful act."

26. Having considered the replying affidavit, the alleged act of the appellant or his advocate pressuring the respondent to sign the mediation agreement does not meet the legal threshold of duress and has not even been substantiated. Moreover, she failed to present an iota of evidence to substantiate her allegations of death threats from the appellant. Thus, this court concludes the allegation of duress was not proved.

27. Consequently, for the reasons and findings mentioned above, this court determines that appellant's notice of motion dated 13/07/2021 was justified and should have been granted by adopting the mediation agreement as a judgment of the court. Therefore, the appeal succeeds, and the ruling dated 15/12/2021 is set aside and substituted with an order adopting the agreement as a judgment of the court.

28. In light of the mediation agreement and the special relationship between the parties, there is a valid reason to depart from the rule that costs follow the event. Accordingly, the appropriate course is to

direct the parties to bear their own costs of the appeal. Ultimately, the court grants the following final disposal orders: -

a. The mediation settlement agreement dated 5/03/2019 is adopted as a judgment of the court.

b. Each party shall bear their respective costs of this appeal.

Judgment accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 7TH DAY OF OCTOBER, 2025.

HON. A. Y. KOROSS

JUDGE

7. 10.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Omollo for the appellant.

Mr. Mutava for the respondent.