



In re Estate of Nzioka Nduva Ithia (Deceased) (Citation Cause E022 of 2023) [2024] KEMC 77 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEMC 77 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
CITATION CAUSE E022 OF 2023
CN ONDIEKI, PM
JUNE 24, 2024**

IN THE MATTER OF THE ESTATE OF NZIOKA NDUVA ITHIA [DECEASED]

BETWEEN

- SYOMITI NZIOKA 1ST CITEE**
- MBULWA NZIOKA 2ND CITEE**
- JOB NTHUSI NZIOKA 3RD CITEE**
- MATHEKA NZIOKA 4TH CITEE**
- STELLA NZIOKA 5TH CITEE**
- JENNIFFER MUTUKU 6TH CITEE**
- MWAO NZIOKA 7TH CITEE**

AND

- THEOPHILUS KISENGE NZIOKA 1ST INTERESTED PARTY**
- DOREEN NYIVA NZIOKA 2ND INTERESTED PARTY**

AND

- THEOPHILUS KISENGE NZIOKA INTERESTED PARTY**
- DOREEN NYIVA NZIOKA INTERESTED PARTY**

RULING

PART I: INTRODUCTION

1. A Mediation Settlement Agreement has a contractual effect. Consequently, such an agreement is for adoption by the Court and if any party to such an agreement is desirous of having it set aside, it can be so



done only grounds which can justify vitiation or rescission or repudiation of a contract. Once entered, just like a contract, it is obligatory on the parties to perform until set aside. Needless to mention, the key grounds which can vitiate and thus justify setting aside of a contract are fraud, mistake, illegality, misrepresentation, duress, coercion, unconscionability and undue influence et alia.

Part II: The 1st Defendant/applicant's Case

2. On 21st February 2023, the Citor filed this Citation dated 17th February 2023, against the Citees, to accept or refuse to take up letters of administration in respect to the estate of Nzika Nduva Ithia (deceased).
3. On 10th July 2023, the interested parties who described themselves as beneficiaries, filed what they called an objection to the proceedings.
4. This Court referred the matter to Court-Annexed-Mediation. The Mediator filed a Mediation Settlement Agreement dated 18th March 2024 accompanied with a Mediator's Report dated 14th March 2024. In the said Report, the Mediator formally conveys to this Court that parties reached a settlement.
5. In a surprising turn of events, on 24th April 2024, the interested parties verbally submitted that there was not settlement since their interest in the estate was not settled by the Mediator.
6. In her response, the Citor submitted that there was a settlement that both the Citor and Citees file a petition jointly and that the interested parties can pursue their interest after the petition has been filed.
7. Commending itself for determination is only one question whether the Citor and Citees have made a case for adoption as a Judgment of this Court, the Mediation Settlement Agreement dated 18th March 2024.
8. Following the said mediation, the Citor and Citees are now in sync and gunning for adoption of the Mediation Settlement Agreement dated 18th March 2024 as a Judgment of this Court.
9. However, the interested parties take a stance that the said agreement does not cater for their interest in the said estate.
10. A mediation Settlement Agreement is by all standards a contract binding on the parties. It thus has a contractual effect. The law requires that such an agreement shall be recorded in writing and registered with the Court which gave the mediation directions and shall be enforceable as if it were a judgment of that Court. A Mediation Settlement Agreement is anchored in law and specifically section 59B of the *Civil Procedure Act*, which reads as follows: "(1) The Court may— (a) on the request of the parties concerned; or (b) where it deems it appropriate to do so; or (c) where the law so requires, direct that any dispute presented before it be referred to mediation. (2) Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a Mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee. (3) A mediation under this Part shall be conducted in accordance with the mediation rules. (4) An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court. (5) No appeal shall lie against an agreement referred to in subsection (4)."
11. Rule 32 of the Civil Procedure (Court-Annexed Mediation) Rules provides for a Mediation Settlement Agreement as follows: "32. (1) Where there is a settlement agreement resolving some or all of the issues in dispute, such agreement shall, with the necessary modifications, be in Form 12 as set out in the Schedule and be duly signed by the parties, the parties' advocates or representatives, and the mediator.



- (2) The mediator shall, within ten days after the conclusion of the mediation, file the settlement agreement in court and provide each party or party's advocate or representative with a copy thereof."
12. Rule 33 thereof provides for a Mediation Report as follows: "33. The mediator shall file a report within ten days after the conclusion of the mediation in Form 13 as set out in the Schedule."
 13. Rule 34 of the Civil Procedure (Court-Annexed Mediation) Rules provides for adoption of Mediation Settlement Agreements. It states that "34. (1) The Mediation Deputy Registrar or other officer designated for that purpose shall, within ten days after the settlement agreement being filed under rule 32, place the settlement agreement before the trial court or other designated officer for adoption. (2) It shall not be necessary for the parties or the mediator to attend court for purposes of adoption of the settlement agreement and such proceedings may be conducted in chambers or virtually. (3) Where the court deems it necessary, it may seek further clarification from the mediator, each party or the party's representative before adopting the settlement agreement."
 14. It follows that a Mediation Settlement Agreement can only be set aside on grounds which would justify setting a contract aside. Conversely, the same grounds which can justify setting aside of a Mediation Settlement Agreement are the same grounds which can justify a Court to decline to adopt a Mediation Settlement Agreement. Such grounds, which are similar to the grounds for setting aside a consent Judgment or Order, were discussed in great depth in *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR, per Hancox JA (as he then was) with Nyarangi & Platt Ag JJA (as they then were) concurring; *Purcell vs. F C Trigell Ltd* [1970] 2 All ER 671, at page 676, per Winn LJ.; *Kinch vs. Walcott* [1929] AC 483. Also, see *Law vs. Law* [1905] 1 Ch 140, at 158; *Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd*, per Githinji J., (as he then was); *Kenya Commercial Bank Ltd vs. Specialised Engineering Co. Ltd* [1982] KLR 485, per Harris, J. (as he then was).
 15. What then are these specific grounds? The specific grounds are fraud, mistake, misrepresentation, duress, coercion, undue influence, collusion, unconscionability, et alia. In the locus classicus decision in such matters namely *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR, Hancox JA (as he then was) with Nyarangi & Platt Ag JJA (as they then were) concurring held that "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 if certain conditions remain to be fulfilled, which are not carried out... "The mode of paying the debt, then, is part of the consent Judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders* (7th edn), vol 1, P 124, as follows: "Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them ... 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 material facts, or in general for a reason which would enable the Court to set aside an agreement." See also *Brooke Bond Liebig Ltd vs. Mallya* [1975] EA 266, at 269, per Law Ag P (as he then was); *Purcell vs. F C Trigell Ltd* [1970] 2 All ER 671, at page 676, per Winn LJ.; *Kinch vs. Walcott* [1929] AC 483. Also, see *Law vs. Law* [1905] 1 Ch 140, at 158; *Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd*, per Githinji J., (as he then was); *Kenya Commercial Bank Ltd vs. Specialised Engineering Co. Ltd* [1982] KLR 485, per Harris, J. (as he then was); *de Lasala vs. de Lasala* [1980] AC 546; *Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya Limited* [2015] eKLR, per Koome, Kantai, JJA; *Azangalala, JA* (as he then was). Also in *Hirani vs. Kassim* [1952] EACA 131, the Court of Appeal of East Africa adopted the following passage from *Seton on Judgments and Orders*, 7th Edition Vol. 1, at page 124 as the correct reflection of the principles governing setting aside of Consent Judgments and/or orders: "Prima facie, any order made in the presence and with a consent of Counsel is binding on all parties to



the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to policy of the Court ...or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable Court to set aside an agreement.” Also, in *Ndirangu vs. Commercial Bank of Africa Nairobi* [2002] 2 KLR 603, Ojuk, J. (as he then was) held that “a. It is well settled law that a consent Judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. b. An Application for review can only succeed if the Applicant proves an error or mistake apparent on the face of the record, discovery of new evidence or any sufficient reason. c. An Application for review on the ground of new evidence will only succeed only if the Applicant proves that he did not have it in his possession at the time and could not have obtained it despite due diligence.” Similarly, in *Mursal Guleid & 2 others vs. Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. expressed himself as follows: “8...A consent Judgment can only be set aside if the consent was actuated by illegality, fraud or mistake. Consent Judgments can be set aside on limited grounds...A consent Judgment is not an ex-parte Judgment... 10. Reasons that would enable Court to set aside an agreement are fraud, mistake, misapprehension or contravention of Court policy must be furnished by an Applicant before the Court can embark on the journey towards interfering with the subject consent.”

16. What is the best way out of a Mediation Settlement Agreement? Parties to a contract can always resile the agreement. Just like contracts, whether or not there are no grounds upon which a contract can be invalidated, parties can by another consent set aside the consent Judgment or order. In *Munyiri vs. Ndinguya* [1985] eKLR, on May 31, 1983 in the presence of Mr. Ndirangu for the Applicant and Mr. C.C. Patel for the Respondent, the following entry was made by V.V. Patel, J. (as he then was): - “By consent it is ordered that this case will be marked settled upon payment by the Plaintiff of a sum of Kshs. 25,000 to the Defendant, which the Defendant hereby agreed to accept in full settlement by monthly instalments of Kshs 3,000 each with effect from July 5, 1983 and then on 5th of each month UDC. In default execution to issue. Earlier orders for costs are set aside. It is ordered that there be no order for costs. The land registrar to remove the caution lodged by the Defendant on the land parcel No Mwerua/Mukure/28 forthwith. V.V. Patel, Judge 31/5/83.” The consent order was entered in the presence of the Advocates for the parties. However, the Advocates did not sign the consent in open Court. The appeal revolved around this failure to sign. While upholding the consent Judgment on grounds that Advocates bind their clients, Platt, JA (as he then was) with Nyarangi, JA and Gachuhi Ag. JA concurring expressed himself as follows: “However, we may observe that as there appears to be a good deal of argument about the contents of some consent Judgments and orders, it would be wise to obtain the signature of the Advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time that the consent order or Judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well-recognised feature of life, despite instructions earlier given to their Advocates. Indeed, if the parties wish to resile, they can always do so, by consent.” {Emphasis supplied}
17. The rationale behind this strict rule is to prevent litigants from turning around afterwards after changing their minds to the prejudice of their opponents who had acted on the consent in good faith. See *Mursal Guleid & 2 others vs. Daniel Kioko Musau* [2020] eKLR, where D.K. Kemei, J. explained the rationale behind these strict principles in the following words: “10...The rationale behind this strict rule is to prevent litigants from turning around afterwards after changing their minds to the prejudice of their adversaries who had acted on the consent in good faith. It is therefore a sound principle.”
18. What amounts to fraud in the context of consent Judgments or orders? In *Mursal Guleid & 2 others vs. Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. defined fraud as follows: “11. Fraud has been defined as “actual fraud or some act of dishonesty.” ... The rules of procedure require that where fraud



is alleged it must be specifically pleaded and the particulars thereof given in the pleading. From the evidence on record, I am not satisfied that the Respondent did actual fraud being that he changed figures or altered a letter head; what is on record is a letter that has been placed before the Court and the Court is left to find out for itself what the Respondent did so as to amount to fraud. The letter in itself falls short of the standard required for proof of fraud and I am not satisfied that there was fraud committed by the Respondent so as to induce the appellants' Advocates to record the consent." In *Waimiha Saw Milling Co. Ltd. vs. Wagon Timber Co. Ltd.* [1926] AC 101 at p. 106. Lord Buckmaster defined fraud to mean some act of dishonesty.

19. What amounts to misrepresentation in the context of consent Judgments or orders? Misrepresentation is a false statement of fact or law which induces a party to enter into a contract. In *Mursal Guleid & 2 others vs. Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. adopted the meaning of misrepresentation as defined in the Law Dictionary as follows: "12. With regard to misrepresentation, the Law Dictionary defines Misrepresentation as: "An intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally; also: an act or instance of making such a representation." 13. My take is that misrepresentation is a false statement of fact or law which induces a party to enter into a contract." Also, in *Esso Petroleum Company Limited vs. Mardon* [1976] 2 All ER 5, misrepresentation was defined to mean an intentionally or negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally. Similarly, in *Bisset vs. Wilkinson* [1927] AC 177), it was held that there must be a false statement of fact or law as opposed to opinion or estimate of future events. In *Horsfall vs. Thomas* [1862] 1 H&C 90, it was held that once the Applicant has established that a false statement was made, the Applicant should take the second step which is to demonstrate that the false statement induced the Applicant to enter into the contract. In *Long vs. Lloyd* [1958] 1 WLR 753, it was held that if the Applicant does an act to adopt the contract or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation, the Applicant will lose the right to rescind it. Regarding misrepresentation, every party has a duty to verify facts relied upon by the opponent before entering into a contract. A party who has the opportunity to verify facts before entering into a contract should not be heard to complain that there was this and that misrepresentation. Negligence to verify on the part of the Applicant will deny the Applicant the right to entitlement to setting aside. In *Mursal Guleid & 2 others vs. Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. expressed himself as follows: "14. The questions that come to mind are, how did the appellant know that the Respondent was not treated at the said facility? Was it possible to verify the information allegedly provided to the appellant by the Respondent before the appellant entered into the consent or to put it another way, how could a stranger give the appellant facts about the accident and they accepted them? Did the stranger know more about the accident than the appellants? Why didn't the appellants verify before concluding the consent? Why didn't the appellant attend the trial that was conducted on 1.7.2015 only later to come up with the said letter? Did it affect the nature of injuries considering that the Respondent underwent a 2nd medical examination? I note that the letter that brought suspicion was authored on 20th July, 2015. The suit in the trial Court stalled since then. However this was after the parties had closed their case. I note that there is a 2nd medical report that forms part of the list of documents that the appellants intended to rely upon. However the same was not tendered and no explanation was given for the appellant's failure to do so. I am of the view that the issue of the medical report had a bearing on the quantum and yet the consent was related to liability and therefore it had no bearing on the consent and cannot be said to have induced the appellants to enter into the consent. In the interests of speedy justice, the matter be allowed to proceed to the logical conclusion where once the Court makes its final decision then if dissatisfied the appellants can appeal against the same. The evidence by the appellants is not enough to meet the legal criteria for



setting aside a consent Judgment. 15. The appellants seem to fault the trial Court for entering a consent Judgment. However from the record, I am satisfied that the consent Judgment was entered by the Court after due consideration of the circumstances of the case. It was therefore done diligently. Once parties present consents either written or oral the Court's duty is to adopt the same and thereafter it becomes an order of the Court and binding upon the parties."

20. What is the ambit or scope of Application of the principles discussed supra? This principle is applicable to both interlocutory and final orders. See *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR, Hancox JA (as he then was) with Nyarangi & Platt Ag JJA (as they then were) concurring. See also *Purcell vs. F C Trigell Ltd* [1970] 2 All ER 671, per Winn LJ with both Lord Denning MR and Buckley LJ concurring that there was very little distinction between interlocutory orders and final orders in this respect.
21. First, the interested parties are strictly not interested parties since they sought no leave to be joined in the Citation as such. From the record, they sneaked into the Citation by filing a Notice of Appointment of an advocate and nothing more. Had they sought leave of this Court, this Court would have had a prime opportunity to perhaps elucidate the law and pronounce itself on the propriety of pursuing such such an interest in a Citation. It's now settled law that purpose of a Citation is narrow. It's to catalyze a party to either accept or refuse to file a petition, and nothing more. Consequently and contrary to the position held by the interested parties, no interest in the estate, is resolved in a Citation. It follows that beyond the Citor and Citees, the interested parties thus remain strangers to this Citation.
22. Second, this objection is premature and not contemplated by the law of succession. An objection or protest seeking to enforce an interest in any estate, can only be filed after a petition has been filed.
23. Third, the issue that their interest has not been catered for cannot be determined in a Citation. The issue can properly so be raised in a protest. For now, it is evidently premature.
24. Fourth, no ground capable of vitiating a contract was raised by the interested parties. The ground raised that their interest has not been catered for in the Mediation Agreement is far from the vitiating factors contemplated by law.
25. Fifth, apart from finding no grounds which can possibly vitiate the mediation agreement, this Court further finds the agreement sound in law.
26. Ultimately, on basis of the foregoing five reasons, this Court this finds the objection against adoption of the mediation agreement absolutely unfounded.
27. For avoidance of doubt, it is not mandatory for the Chief to include the interested parties in his letter since the interested parties are at liberty to file a Protest at the appropriate time.
28. Wherefore this Court:
 - i. Adopts the Mediation Settlement Agreement dated 18th March 2024 as a Judgment of this Court, *mutatis mutandis*, in exercise of the powers reposed on this Court by section 59B (4) of the *Civil Procedure Act* as read with Rule 34(1) of the Civil Procedure (Court-Annexed Mediation) Rules, 2022.
 - ii. Each party shall bear his/her own costs of this Citation.
29. Orders accordingly.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS
24TH DAY OF JUNE, 2024**



.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Citor:.....

1st Citee:.....

2nd Citee:.....

3rd Citee:.....

4th Citee:.....

5th Citee:.....

6th Citee:.....

7th Citee:.....

Advocate for the Interested Parties:.....

Court Assistant:.....

