

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CIVIL APPEAL NO. E011 OF 2025**

**ALEX** **RHIGHO**  
**AMUMA.....APPELLANT**

**VS**

**JEDIDAH** **HAIDO**  
**NYAMBU.....RESPONDENT**

**(Being an appeal against the ruling of Hon. Otuke (SRM) and  
delivered on 15.07.2025 in Civil Suit No. 31 of 2021 at Garissa)**

**JUDGMENT**

1. The respondent herein moved the trial court via a plaint dated 13.07.2021 seeking for the following orders:
  - i. The refund of loan balance.**
  - ii. Costs of the suit.**
  - iii. Interest on (i) and (ii) above.**
  - iv. Any other relief the court deems fit to grant.**
  
2. The crux of the suit is that between December 2015 and February 2016, the respondent advanced a cumulative sum of Kes. 509,315 to the appellant by way of a friendly loan. She averred that on 15.12.2016, she wired Kes. 260,000 into the appellant's account at Co-operative Bank, Garissa branch, and on 03.02.2016, she paid Kes. 249,315 into the Hola Law Courts Judiciary account to settle a fine in Criminal Case No. 193 of 2014, in which the appellant had been convicted.
  
3. She further averred that on 13.05.2020, the appellant deposited Kes. 50,000/- into her account as part repayment, leaving an

outstanding balance of Kes. 459,315/-. The respondent added that the parties later entered into an agreement requiring the appellant to repay the debt in monthly instalments of Kes. 100,000 beginning 31.05.2021, but despite repeated demands, the appellant failed to honor the agreement.

4. On 28.09.2021, the matter came up for hearing before the trial court when counsel for the appellant urged court to give parties 45 days to pursue an outside court settlement. The court acceded to the request and fixed the matter for 30-11-2021 to confirm whether parties would have reconciled.
5. Subsequently, parties appointed their own mediator and proceeded to sign an agreement titled mediation agreement dated 17-06-2022 where by consent/agreement stated how they wished to have the debt settled.
6. The agreement was adopted as an order of the court on 5-7-2022. The agreement was to the effect that the amount in dispute of Kshs 430,000/= was to be paid by the defendant as follows;
  - (a) First batch of kshs 200,000/= to be paid in instalments of 20,000/= per month via the plaintiff's Mpesa starting July 2022 to June 2023. A copy of payment to be sent to the mediator.
  - b) The second batch of 230,000/= to begin in July 2023 in monthly payment of Kshs 20,000/= and to be completed in July 2024

- c) That in the event of any delay, the defendant to notify the plaintiff in good time and when to pay.
  - d) That Alex (defendant) had committed himself to ensure that the agreed paid arrangement was not interrupted unless there was a good reason to do so.
  - e) parties agreed that the said agreement remains private with the court from their Advocates who were handling this matter.
7. The said agreement was signed by both parties before their self-appointed mediator namely; Kaari Charity Kampio and then filed in court and adopted as an order of the court.
  8. The respondent consequently filed a notice to show cause dated 20.02.2024 which application acted as a wakeup call to the appellant thus prompting him to file an amended application dated 23.07.2024 seeking to set aside the mediation agreement urging that he was forced to sign the same.
  9. The court upon considering the said application dismissed the same via a ruling dated 15.07.2025. It is the said ruling that is the subject of this appeal.
  10. The appellant filed a memorandum of appeal dated 23.07.2024 citing the following grounds:
    - i. That the learned trial magistrate erred in fact and law in conducting proceedings that can't amount to proper judicial proceedings.**

- ii. **That the learned trial magistrate erred in fact and law in dismissing the application by the appellant thereby confirming the illegal proceedings.**
  - iii. **That the learned trial magistrate erred in fact and law by failing to note that there was no order directing the parties to go for court annexed mediation; no confirmation from the parties on the choice of a mediator; parties weren't invited through their advocates and that no hearing ever took place.**
11. This court was therefore urged to allow the appeal and set aside the finding by the trial court.
12. The appeal was canvassed by way of written submissions.
13. The appellant submitted by first taking the court through the Civil Procedure (Court Annexed Mediation) Rules, 2022, which provides that:
- (2) Where a dispute is referred to mediation under sub section (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 direction under subsection (1),**

**and shall be enforceable as if it were a judgment of that court.**

14. That lack of a valid referral letter is a violation of Rule 5(3) and as in this case, there was no referral order. It was urged that noting that there was no referral order, the trial magistrate could not treat this matter as having gone through mediation.
15. It was also urged that the purported settlement was also not in the prescribed format as required by Rule 32(1). That the appellant was thus not accorded a fair hearing in the given circumstance and therefore, this court was urged to allow the appeal as prayed.
16. The respondent opposed the appeal by submitting that the appeal be dismissed for want of merit. That the fact that the appellant moved court after a period of 18 months after the adoption of the mediation settlement is questionable. That the appellant did not provide evidence to support his prayers in the appeal herein. It was urged that the appellant prior to settling this matter down, approached the mediator and requested that the advocates ought not be involved in the mediation process.
17. It was argued that the mediation agreement is not only binding but also not appealable as the appellant did not demonstrate why the said agreement ought to be reviewed or set aside. In the end, this court was urged to dismiss the appeal with costs.
18. I have considered the appeal herein and the rival submissions. The only issue for determination is whether the mediation

agreement adopted by the trial court on 05.07.2022 ought to be set aside.

19. Before I proceed to make a determination, am curious to ask one question. Was there a court annexed mediation referral order made by the court so as to trigger in the application of court annexed mediation rules?. From the record, there was no request by any party nor did the court on its own motion make an order to have the matter referred to a court appointed mediator.
20. What took place in court on 28-9-2021 was a request by counsel for the plaintiff for the court to allow the parties pursue an outside court settlement and record what they referred to as a reconciliation which in my view can be translated to mean a consent. What parties recorded thereafter was more of a consent/agreement mediated privately by their joint appointed mediator who appended her signature against their signatures. The allegation that the applicant was forced to sign the agreement cannot be true. Why didn't he complain immediately that he had been coerced to sign an agreement rather than wait from 17-6-22 up to 15- 3-2024.
21. It is trite that he who alleges must prove. See Sections 107,108 and 109 of the Evidence Act. This position was further espoused in the case of **Momanyi v Attorney General & 2 others (Petition E007 of 2025) [2026] KEELRC 282 (KLR) (3 February 2026) (Judgment)**. In my view, nothing tangible was presented before the court to suggest that force was used and by who. This is an imaginary allegation.

22. Having dismissed the allegation of coercion, under what circumstances can a consent order or agreement entered by parties be set aside? In the case of **Flora Wasike vs Destimo Wamboko (1988)1 KAR 625, Hancox JA** (as he then was) said in his judgment at page 626 -

**"It is now settled law that a consent judgement 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."**

23. Similar position was laid out in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)** where the court of appeal held that;

**" It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation. (See Brooke Bond Liebeg (T) Ltd v. Mallya [1975] EA 266; Flora Wasike v. Destimo Wamboko [1988] KLR 429, and Kenya Commercial Bank Ltd v. Benjoh Amalgamated & Another, CA No. 276 of 1997).**

24. In the circumstances of this court, there was no proof or fraud, mistake mis-representation of facts or coercion. In my view, the agreement was voluntarily entered and any complaint at this stage will amount to a travesty of justice.

25. Assuming for a moment that there was a court annexed mediation order which is not, is there reasonable ground to interfere with the same agreement?
26. Mediation as an alternative dispute resolution mechanism is thus anchored in Article 159 (2)(c) of the Constitution of Kenya which provides as follows:

**“In exercising judicial authority, the courts shall be guided by the following principles;(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).”**

27. Regarding the place of Mediation in our judicial system, Muchelule J (as he then was), in the case of **In re Estate of BM (Deceased) [2019] eKLR**, made the following comments:

**“13. The Family Division and the Judiciary as a whole have embraced mediation in the resolution of civil disputes filed by the parties. Mediation is an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. Like was stated by Judge P.J.O. Otieno in Amcon Builders Ltd - v- Vintage Investments Ltd & Another [2018] eKLR, the mediator merely guides the parties by setting an atmosphere for mutual, candid and honest discussions. He makes no determination. Where the**

**parties have agreed on all, or some of, the issues in dispute he helps in the drafting of the agreement which is then owned by the parties by them appending their signatures.**

**The agreement, known as the mediation settlement agreement, is then filed into court which adopts the same as the order or judgment of the court. The agreement becomes enforceable ..... if the mediation collapses, or no agreement is reached, the matter returns to court to be heard in the normal manner.**

**The parties may ask the judge to refer their matter to mediation, or the judge may on his/her motion refer the matter to mediation. Parties are under obligation, when referred to mediation, to attend the mediation sessions, and to act in good faith during the process.**

**...15. Court Annexed Mediation enhances access to justice, reduces backlog and, most importantly, allows parties an opportunity to generate home-grown solutions to their disputes. Solutions that they can live with and which can bolster their long-term relations. This is why, ordinarily, such a solution is not appealable. It is a contract mutually arrived at, and which would not, ordinarily, be the subject of review..."**

28. The process of setting aside of a Court order adopting a Mediation Settlement Agreement is governed by Section 39(1) of

the Civil Procedure (Court Annexed Mediation Rules) which provides as follows;

**(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 sub-rule (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 mediation settlement agreement:**

**a. Misconduct, fraud or 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 to the applying party at the time of execution of the settlement agreement and should be one which affected the process 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 witnesses or any person who took part in the proceeding 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 to enter into the subject agreement and which has rendered such agreement unfair and inequitable.**
- d. Where a party was, at the time of making of the agreement, under some legal incapacity to take part in the subject mediation proceedings or to conclude and execute a binding settlement.**
- e. Where the settlement agreement is invalid under Kenya or international law, or has become incapable of enforcement under Kenyan Law.”**

29. The above Rules therefore clearly envision, as a first step, the seeking of leave to set aside as a separate stage from the filing of the substantive application. In this case, the appellant in the first place did not even seek leave to file the application herein yet he's seeking for orders to review or set aside the ruling by the trial court.
30. Noting that the appellant has not demonstrated that there was anything unconscionable, unequitable or unfair in the agreement, I find that the appeal lacks merit. The appeal is purely intended to delay execution of a legitimate claim thus a mockery of justice if allowed. Therefore, the decision of the trial court is upheld in its entirety. The appeal is dismissed and as costs shall follow the event, I do award the same to the respondent.

Dated, signed and delivered this 19<sup>th</sup> day of February 2026.

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**J. N. ONYIEGO**  
**JUDGE**