



Masai v Masai & 2 others (Environment & Land Case 31 of 2020) [2024] KEELC 3318 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 31 OF 2020**

FO NYAGAKA, J

APRIL 23, 2024

BETWEEN

MARY JACKSON MASAI PLAINTIFF

AND

JACKSON SIRKEN MASAI 1ST DEFENDANT

JACKSON M. YARALIMA 2ND DEFENDANT

COUNTY LAND REGISTRAR, WEST POKOT 3RD DEFENDANT

RULING

1. The Notice of Motion before me is dated 07/02/2024. It was brought under Sections 80 of the [Civil Procedure Act](#), Order 45 Rule 1(a) of the Civil Procedure Rules, 2010 and all other enabling professions of law. It is sought the following orders.
 1. ...spent
 2. ...spent
 3. That at the inter partes hearing of this application the Honourable Court be pleased to review the its orders of 11/01/2024 by setting aside a consent judgment entered into on date (sic) 6/7/2023.
 4. That upon the grant of prayer (3) above this Honourable Court be pleased to set down the suit for hearing .
 5. That the costs of this application be provided for.
2. The application was based on the grounds that there were sufficient grounds to warrant the review sought. Pursuant to the orders issued on 10/01/2024 the applicant was evicted from her matrimonial home where she had lived for over 45 years. She was coerced into signing the alleged mediation



- settlement agreement. The mediator and the two defendants took advantage of the applicant's illiteracy and old age by misleading her to sign the document. The agreement was never shared with her in order to seek independent interpretation from her advocates on record or any family member before she signed it.
3. That on 06/07/2023 when the agreement was adopted by the Court, the applicant was not in court to confirm the contents and she was not aware that the same was to be adopted as the final judgment of the court without being heard. On 29/01/2024 the applicant was shocked when the Applicant, in the company of police officers visited the suit property and demanded that she vacates the property. It was the date she learnt that she was duped into signing away her property. At the mediation session she was only asked to append her finger print on a document the mediator stated would be presented to the judge for further directions and if she refused to sign the judge would be informed that she refused to cooperate and her case be dismissed.
 4. Since she was alone in the session and without any representation she had no choice but to append her finger print. She now disputed the contents of the agreement as she did not agree to give away her matrimonial property to the 2nd Defendant. She was misled into signing the agreement which she did on threats. She was desirous of having the matter heard on merits since both defendants and their agents had for long conspired to take away her property. The Applicant was made in good faith. No prejudice would be suffered by the Respondents if the orders were granted as the parties would have opportunity to be heard.
 5. The Application was supported by her Affidavit which she swore the same date as the application. In the deposition she repeated the contents of the grounds. She annexed as MJM-1 and MJM-2 the copy of the order of the Court and the agreement, respectively. This Court therefore needs not repeat the contents of the affidavit as it takes the contents of the grounds as the factual position of the applicant in this application.
 6. The Application was opposed by the Defendants. The 1st Defendant swore his Affidavit in reply on 27/02/2023 and filed it on 28/02/2024. He deponed that the order issued on 10/01/2024 emanated from a mediation agreement which settled the matter. Further that they attended the mediation session whereat they agreed voluntarily to settle the matter and the Applicant appended her thumb print on the document. He was surprised that the Applicant sought to review the order. Before the Court adopted the agreement, the parties were given opportunity to peruse the same ad on 06/07/2023 both learned counsel were present when the Court adopted the agreement.
 7. He deponed further that it was not true that the Applicant was evicted from the property but she voluntarily deserted the property in 1995 where she migrated to Kitale where she lived to the time of the application. That contrary to the deposition that the Applicant was duped or coerced into signing, she had learned counsel whom she could consult for clarification. Further, that on 06/07/2023 when the Court adopted the mediation settlement both learned counsel were in Court, virtually.
 8. The deponent swore further that he has been informed by the 2nd Defendant that on 12/01/2024 his son, one Boniface Kiptoo, maliciously and without any valid reason destroyed his house which was on the suit property. As a result the incident was reported to Keringet Police Station. He annexed and marked as JSM-1 a copy of the summons compelling attendance. The son was summoned to the Police station whereat he agreed that the 2nd Defendant be left to enjoy quiet possession of his property. He annexed as JSM-2 a copy of the agreement dated 23/01/2024 made by his son. He swore that they all voluntarily appeared before the mediator, but in absence of both counsel, and they signed the agreement without coercion. The Agreement was later adopted by the Court. summarized hereafter. He denied the deposition by the applicant that she never voluntarily and willingly signed to give away



- her land and her further deposition that she was misled. If the applicant was not dissatisfied with the mediation settlement she had the option not to sign it and the mediator could have written a report as much.
9. The 2nd Defendant also swore his replying affidavit on 27/02/2024. In it he deponed how he bought the suit land measuring 1.2 acres or thereabout in the year 2012, and how he conducted an official search before the purchase. He annexed and marked as JMY-1 a copy of the agreement. After that the 1st Defendant took him to the Land Control Board (LCB) and the land was later registered in his name on 29/05/2013. He annexed and marked as JYM-2 copies of the application to the LCB, the consent therefrom and the title deed. He deponed that he was the absolute owner of the parcel and the issue had been compromised via the mediation agreement which the Applicant signed. He too swore that the order of 10/01/2024 was as a result of a mediation settlement agreement.
 10. He deponed further that before the agreement was adopted, parties were given chance to peruse it and on 06/07/2023 both learned counsel were present in Court when the adoption was made. He swore that the Applicant was not evicted as she deponed since in 2012 when he bought the land it was vacant and the Applicant had never been in possession since. The Applicant was never duped to sign the mediation agreement and she had counsel who was previously on record whom she was free to consult for clarification before adoption. He denied the applicant's deposition that the agreement was never shared with her for purpose of seeking independent interpretation and advise. He denied further that the Applicant was not aware of the mediation agreement when it was adopted on 06/07/2023 because she was represented by learned counsel.
 11. He deponed that on 12/01/2024 one Boniface Kiptoo, a son of the 1st Defendant and the Applicant maliciously and without any reason whatsoever destroyed the 2nd Defendant's house and he reported the matter to the police. He annexed and marked as JYM-3 a copy of document compelling him to attend Keringet Police Station. On 23/01/2024 the said Boniface Kiptoo attended the police station and made an agreement to the effect that the 2nd Defendant should have quiet possession of the suit land. He annexed and marked as JYM-4 a copy of the agreement. He deponed that the applicant has not shown any evidence that she was evicted. He too repeated that they voluntarily signed the mediation agreement. He too repeated a deposition that of the applicant was dissatisfied with the mediation agreement she should not have signed it, and the mediator could have filed a non-compliance report.
 12. He deponed that the Applicant had taken over five months to challenge the agreement and she had no valid reason for the delay. He stated that the applicant was untruthful that no prejudice would be occasioned by the application.
 13. The Applicant swore a Supplementary Affidavit in answer to the replying affidavits. She deponed that she did not agree to the signing of the agreement as a settlement but that she signed it believing she would be given an opportunity to appear in Court to give evidence. She reiterated that she could not have perused the agreement and understood when she did not know how to read and write. She never received independent advice from her advocate on record of her signing the agreement and she was not informed that it would be adopted by the Court.
 14. About the depositions that she deserted the matrimonial home she swore that she did not. Rather that she only visits her brother who lives there but it is not her home. Instead it was the 1st Defendant who had never lived on the suit land since 1987 when he ran away when he planned to sell the land secretly. She annexed and marked as MJM-1(A) and (B) copies of letters dated 29/04/1987 and 09/02/1989.
 15. Regarding the fact that Boniface Kiptoo destroyed the house on the suit property she deponed that it was irrelevant. She deponed further that if the two defendants believed they entered into a legitimate



agreement they could not have anything to hide and should let the orders of review be granted and the matter be set for hearing.

16. The Application was disposed of by way of written submissions. This Court has considered the application, the law and the rival submissions of the parties. It will infuse the analysis and determination of the merits of the application with the submissions of the parties.

Analysis and Determination

17. I am of the view that only three issues lie before me for determination. They are whether the consent judgment herein merits being set aside, whether the Applicants had demonstrated that they merit being added as Defendants, and who to bear costs of the application.

a. Whether the Consent Judgment herein merits being set aside

18. The first issue for determination herein is whether the consent judgment entered into herein and the decree thereto merit setting aside. First, it is worth noting that the application was for review of the orders of the Court as stated above. Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the Civil Procedure Rules set out the law on review. It is now settled law that for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, the applicant must prove that:

- i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge and which could not therefore produce at the time the order was made or,
- ii. Some mistake or error apparent on the face of the record or,
- iii. Any other sufficient reason.
- iv. Further that the application has been brought without undue delay.

19. The Applicant has not argued on how the application is for review, that is to say, whether she has brought herself within the parameters above. Instead she threw her efforts on merely setting aside the judgment. Therefore, the Court will not take time to consider the requirements of review in detail.

20. It is worth noting that consent judgments or orders are not set aside either as a matter of course or in a discretionary manner as ordinary judgments or orders. It happens under certain specific and special circumstances. Regarding applications or requests of such a nature, the learned author, Henry Wilmot Seton, on Forms of decrees, Judgments and Orders 7th Edition Vol. 1 page 124 states 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 cannot be varied or discharged unless obtained by fraud or collusion, or by any agreement contrary to the policy of the court ... or if the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement.”

21. Therefore, a consent judgment can be set aside only under the grounds such as those that entitle a court to set aside a contract between parties. These include fraud, collusion, common mistake, misconception and/or the like. Thus, the Court of Appeal, in *S M N vs. Z M S & 3 others* [2017]



eKLR, restated the principles upon which a court may interfere with a consent order or judgment. It stated:

“Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt.”

22. Additionally, in *Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd* [1982] KLR 485, Harris, J held, inter alia, that:

“1. A consent order entered into by counsel 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 misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

23. Similarly, much earlier, in *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR, the same Court of Appeal held as follows:

“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: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983.”

24. Applying the principles in the authorities above to the facts herein, that she was misled and coerced into signing the mediation settlement agreement, the mediator and the Respondents took advantage her illiteracy and old age by misleading her to sign the document. She was denied opportunity to seek independent interpretation from her advocates or other family member before she signed it. Thus, she was duped into signing away her property.

25. On their part the Respondents argued that the mediation agreement was voluntarily entered into and before adoption on 06/07/2023 the Court gave parties opportunity to peruse it. At that point they would have raised the issue yet even with both learned counsel being present the Applicant did not.

26. This Court has carefully weighed the facts and the law. First, it notes that the Applicant was ably represented by counsel who participated in the adoption of the mediation agreement. The record bears out that this happened on 06/07/2023 after the court had called on learned counsel earlier to confirm the contents of the agreement. As a fact, on 05/07/2023 both learned counsel for the parties appeared before the Court and the Applicant's asked for time to get the agreement and get instructions on it. Then they appeared on 06/07/2023 and had it adopted. What other better instructions could have been to counsel. In light of the record the burden was fully on the Applicant to demonstrate that when her learned counsel sought time to consider the agreement he considered it with the Applicant and she agreed to it, it at all it was voluntary.

27. The Applicant contends that she was coerced into thump printing the agreement. What the Court does not understand about that is why, if anything the Applicant kept quiet from the time that happened



to the time of adoption and then all the way to the time of the alleged eviction five months later. She had time to consult the advocate and alert him of the agreement, if indeed it was not signed voluntarily. Moreover, the Applicant accuses the learned counsel formerly on record for not giving her independent advice before he gave a nod to the adoption of the mediation agreement. She does this by deposing to the fact that she did not have time before thump printing the agreement. Well, granted that it was so, the Advocates ought to have sworn an affidavit to indicate that indeed he did not have instructions to record the consent: that is that by the time he was called upon to confirm the contents of the document he did not consult the client. That would have convinced the Court that the Applicant did not get independent advice from learned counsel. I find her argument a gimmick to obtain the orders sought because if indeed it was true as alleged, the Applicant quietly let the former advocates to sign a consent to exit this matter only for her to raise issues which she knows well that it will not be possible to get an independent fact to corroborate her depositions. She did not even bother to get the mediator to attend Court to confirm the allegations. This is akin to condemning the advocate unheard or conveniently keeping the Court in the dark.

28. The totality of my analysis is that the consent judgment of the 06/07/2022 was duly and properly entered into. I see no mistake or error or misrepresentation. The application herein is an afterthought and a classic case for dismissal.

c) Who to bear the costs

29. Regarding who to bear the costs, Section 27 of the *Civil Procedure Act* is instructive. Costs will always follow the event save where the judge or judicial officer is of the view, for reasons to be recorded, that the result be different. The event herein is that the application has wholly failed, and I have no reason to think otherwise than the way the law provides on costs. The Applicant shall bear them.

d. Final Deposition

30. The application dated 07/02/2024 is hereby dismissed with costs to the Respondent.
31. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23RD DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA
JUDGE

