



**Maranga v Mwangi & 2 others (Environment & Land Case
38 of 2014) [2024] KEELC 3453 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 38 OF 2014
SM KIBUNJA, J
APRIL 11, 2024**

BETWEEN

NICODEMUS NYAGAKA MARANGA PLAINTIFF

AND

GRACE GATHONI MWANGI 1ST DEFENDANT

JAMES KAMAU WACHIRA 2ND DEFENDANT

LEAH MUTHONI KANUGO 3RD DEFENDANT

RULING

1. The plaintiff moved the court through the application dated the November 3, 2023 seeking for:
 - a. Leave be granted for the plaintiff to set aside the partial settlement agreement dated May 29, 2023.
 - b. The order issued by this court arising from the partial settlement agreement be set aside.
 - c. The court be pleased to refer the matter to mediation once more.
 - d. The costs be provided for.

The application is based on the six (6) grounds on its face, and supported by the affidavit of Nicodemus Nyagaka Maranga, the plaintiff, sworn on the November 3, 2023. It is the plaintiff's case that the partial settlement agreement has a fundamental mistake of leaving out the 2nd and 3rd defendants, and requiring the County Government of Mombasa, that is not a party, to refund the rates paid by the plaintiff.

2. The application is opposed by the defendants through the replying affidavit of Grace Gathoni Mwangi, the 1st defendant, sworn on the November 10, 2023 in which she *inter alia* deposed that the plaintiff and her counsel signed the consent order and cannot turn around and claim to be aggrieved by the



same; that there is nothing in law stopping her from being responsible for any compensation ordered towards the plaintiff; that no grounds warranting the setting aside of the consent under Rule 39(3)(a) & (e) of the *Mediation Rules* has been established; that the issue of the County Government does not amount to a fundamental issue needing the consent to be set aside as it should credit the amount paid by the plaintiff as rates on the property and the registered owner to refund the same to the plaintiff.

3. That following directions issued on the November 20, 2023, the learned counsel for the plaintiff and defendants filed their submissions dated the December 4, 2023 and December 8, 2023, which the court has considered.
4. The following are the issues for the determinations by the court:
 - a. Whether the plaintiff has met the threshold for setting aside the partial settlement agreement dated the May 29, 2023 and the adoption order thereof.
 - b. What orders to issue under the circumstances of this suit.
 - c. Who pays the costs of the application?
5. The court has carefully considered the grounds on the application, the affidavit evidence, submissions by the learned counsel, superior courts decisions thereon, the record and come to the following findings:
 - a. That to appreciate the dispute between the parties herein, it is incumbent upon the court to set out in summary the pleadings and background leading to the current application. To start with, this suit was commenced by the plaintiff against the three defendants through the plaint dated the February 24, 2014 and amended on the January 26, 2016. The plaintiff seeks for among others:
 - i. A declaration that the sell agreement purported signed by the 1st defendant alone disposing plot No.565 Mikindani, now Msa/Mn/Block 1/1172, the suit property, is null and void.
 - ii. An order cancelling the 2nd and 3rd defendants title and any other transfer thereof.
 - iii. General damages.
 - iv. Any other relief deemed appropriate.
 - v. Costs.
 - vi. Interest.

The 1st defendant opposed the suit and filed the statement of defence dated the 1st March 2022, averring inter alia that she is the one who had purchased the suit property when the plaintiff was out of the country; that she had only included his name in the title out of love as his wife; that the plaintiff was aware of the sale of the suit property to the 2nd and 3rd defendants, and is only extending their marital problems to the transactions because they are now separated; that another proceedings over the same issues and between the same parties being Mombasa CMCC No. 526 of 2007 was dismissed; that the plaintiff's suit should be dismissed with costs to the 2nd and 3rd defendants; that the 2nd and 3rd defendants be declared the lawful owners of the suit property. The plaintiff's claim was also opposed by the 2nd and 3rd defendants through their statement of defence and counterclaim dated the October 15, 2021. They averred *inter alia* that they bought the suit property with unfinished structure from the plaintiff and 1st



defendant who presented themselves as husband and wife at Kshs.1,500,000; that they brought down the structure and built a 28 bedsitters unit at great costs and they prayed for:

- vii. The plaintiff's suit to be dismissed with costs.
- viii. Declaration that they the lawful owners of the suit property.
- ix. Costs in the suit and counterclaim.

The plaintiff opposed the 2nd & 3rd defendants' counterclaim through the reply to defence and defence to counterclaim dated the November 3, 2021. He averred that he had put up the incomplete structure at Kshs.5 million; he denied receiving Kshs,1.5 million from 2nd and 3rd defendant and consenting to the sale of the suit property; that the counterclaim should be dismissed with costs.

- b. The defendants then filed a notice of motion dated the April 26, 2023 seeking for *inter alia* leave to amend their defence as per the annexed draft. There is however no evidence whether the application has ever been served to date.
- c. That the record confirms that the suit was referred for court annexed mediation on the March 16, 2023. A partial settlement agreement executed by all the parties and their counsel on the May 25, 2023, and forwarded through the mediator's report dated the June 5, 2023, was adopted as an order of the court on the July 19, 2023. That according to the said agreement, the parties agreed as follows;

“Issues Agreed on:

- 1. Nicodemus Nyagaka Maranga, Grace Gathoni Mwangi, James Kamau Wachira and Leah Muthoni Kanyugo agreed that a valuation for the plot and initial incomplete structure (up to ground floor and 1st floor), before sale, be done and Nicodemus to be given 50% of the value by the 1st defendant.
- 2. Nicodemus Nyagaka Maranga, Grace Gathoni Mwangi, James Kamau Wachira and Leah Muthoni Kanyugo agreed that the court should issue an order the County Government to refund Nicodemus Nyagaka Maranga all the rates paid in respect of the plot No. 565 Mikindani with interest.

Issues not Agreed on.

- 1. Whether Nicodemus Nyagaka Maranga should get proportionate share of the prospective income generated by the structure upto to ground floor and its 1st floor if any, Grace Gathoni Mwangi, James Kamau Wachira and Leah Muthoni Kanyugo did not agree.
- 2. Whether Nicodemus Nyagaka Maranga is entitled to costs. Grace Gathoni Mwangi, James Kamau Wachira and Leah Muthoni Mwangi did not agree.

All the parties were unanimous that this matter should be left to the court's determination.”

- d. In support of the application, the learned counsel for the plaintiff has submitted that from the facts contained in the mediator's report, it was clear the valuation of the old structure was not possible as it had been demolished. That the order that the County Government was to



refund to the plaintiff's the rates he had paid over the suit property could not be enforced. That there was therefore a fundamental mistake that renders the partial settlement agreement unfair and inequitable and it should be set aside under Rule 39(3)(c) of the [Civil Procedure \(Court Annexed Mediation\) Rules](#). In rebuttal, the learned counsel for the defendants submitted that the application is incompetent as no leave of the court was sought for before it was filed and it should be dismissed with costs. That no mistake warranting the setting aside of the agreement has been established as the parties were aware at all material times that the incomplete maisonette was no longer on the land when they agreed to have the valuation done. The counsel cited several superior courts decisions including [Victoria Distributors Limited versus Synohydro Corporation](#) (2016) eKLR, and [Linda Wagah versus Johnson Mwangi Mariu](#) (2021) eKLR.

- e. On the issue of whether or not the plaintiff has obtained leave to file an application for settling aside the partial settlement agreement, I have noted prayer (1) on the notice of motion is for “..leave be granted for the plaintiff to set aside the partial settlement agreement....” Though it could have been much tidier for the application for leave to have been phrased more clearly, leaving no doubts it was for leave to be granted for the plaintiff to apply for the setting aside order, the court having considered its obligations under Article 159(2)(d) of the [Constitution](#) of Kenya, finds in the circumstances of this case, leave has been sought under prayer (1), and is hereby granted.
 - f. That on the complaints surrounding the first agreed issue that “Nicodemus Nyagaka Maranga, Grace Gathoni Mwangi, James Kamau Wachira and Leah Muthoni Kanyugo agreed that a valuation for the plot and initial incomplete structure (up to ground floor and 1st floor), before sale, be done and Nicodemus to be given 50% of the value by the 1st defendant” the parties and their counsel conscientiously and voluntarily executed the agreement. There is no facts presented to show or suggest the execution was influenced or obtained through fraud, collusion, misapprehension, mistake or is against public policy for it to be considered for setting aside. The application fails on that ground.
 - g. That on the aspect of an order that “Nicodemus Nyagaka Maranga, Grace Gathoni Mwangi, James Kamau Wachira and Leah Muthoni Kanyugo agreed that the court should issue an order the County Government to refund Nicodemus Nyagaka Maranga all the rates paid in respect of the plot No. 565 Mikindani with interest” the court has considered the 1st defendant’s deposition at paragraph 4 of her replying affidavit to the effect that there is nothing in law stopping her from being responsible for any compensation ordered towards the plaintiff, to by implication express her preparedness to meet that compensation, should it become difficult to issue the order against the County Government for reason that it is not a party in the suit. Obviously, it would be going against the legal spirit of Article 50 of the [Constitution](#) to issue an order affecting the County Government without according it an opportunity to be heard in the matter. Such an order would not only be unconstitutional, but also against public policy and the partial settlement agreement will need to be varied to that extent only. The need to vary the partial settlement agreement to that extent does not affect the rest of the parties’ agreement therein.
 - h. Under section 27 of the [Civil Procedure Rules](#), costs should follow the events unless otherwise ordered by the court for good cause. In this instance, I am of the view that each party should bear their own costs so as to foster the spirit of reconciliation and good will between the parties.
6. Flowing from the above conclusions, the court finds and orders as follows:



- a. That the application succeeds only in respect of the agreed issue number 2 in the partial settlement agreement that is against the unspecified County Government, that is not a party in the suit which is hereby set aside.
- b. The issue of the rates paid to remain as part of the outstanding matters to go to trial if not otherwise resolved by the parties.
- c. That the rest of the partial settlement agreement is upheld.
- d. Each party to meet their own costs in the application.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 11TH DAY OF APRIL 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: M/s Mwanzia

Defendants : Mr. Kitonga for Jengo.

Wilson – Court Assistant.

