



Tiego & another v Mahagwa & another (Environment & Land Case E004 of 2023) [2024] KEELC 6182 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE E004 OF 2023
E ASATI, J
SEPTEMBER 19, 2024**

BETWEEN

SAMMY TIEGO 1ST PLAINTIFF

ALFRED ANOBI 2ND PLAINTIFF

AND

JULIUS MAHAGWA 1ST DEFENDANT

BENSON ONDEGO MAHAGWA 2ND DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated 7th June 2024 brought by the Plaintiffs under the provisions of Rule 39 (3) of the Civil Procedure (Court Annexed Mediation Rules, 2022). The application seeks for orders that: -
 - i. The court be pleased to grant leave to the applicants to set aside the mediation settlement agreement presented in this case by the court appointed mediator.
 - ii. Upon grant of prayer (i) above the mediation settlement agreement in this matter be aside and the matter be set for hearing and final determination by the court.
 - iii. The costs of the application be provided for.
2. The application was based on the grounds that there was collusion and/or misconduct on the part of the mediator and the Defendants during the mediation proceedings which led to the one-sided Mediation Settlement Agreement. That the applicants did not consent to the Mediation Settlement Agreement as alleged and the report is not therefore a valid Mediation Settlement Agreement. That at some point parties were denied virtual access to the mediation proceedings leading to a one sided mediation proceedings. That there was therefore a fundamental mistake on the part of the mediator to



- present one sided settlement agreement as a mediated settlement agreement between the parties. The applicants' witnesses were denied an opportunity to present their views. Interest of justice and fair play.
3. The application was supported by the averments in the Supporting Affidavit sworn by the 1st Plaintiff on the 7th June 2024 and the Supporting Affidavit sworn by Wilfred Endelwa on the same date.
 4. The application was opposed vide the averments in the Replying Affidavit sworn by the 1st Respondent on behalf of himself and the 2nd Respondent. It is the Respondent's position that the application is defective, premature, mischievous, misconceived made in bad faith, an abuse of court process, an afterthought and is intended to prejudice the Respondents. That the plaintiffs attended and participated in the mediation process. That the 1st Plaintiff voluntarily executed the agreement. That no objection was raised by the plaintiffs regarding the sessions. That the threshold for setting aside a mediation settlement agreement had not been met.
 5. A brief background to the application is that the applicants herein vide the amended plant dated 24th July 2023 sued the Respondents over a parcel of land known as SOUTH MARAGOLI/CHAGENDA/1141 belonging to his father which the applicants claim was later transferred in favour of the 1st Defendant in trust for the plaintiffs/applicants. They sought for orders that a declaration be issued that the land was registered in the name of the 1st defendant in trust for the plaintiff and that the court do direct that the said land be transferred in favour of the Plaintiffs, an order of permanent injunction restraining the Defendants from interfering with the land and costs of the suit.
 6. Upon hearing 3 witnesses into the case, the court made an order referring the matter to mediation via Court Annexed Mediation. It emerged from the evidence that parties in the matter are close relatives.
 7. The application was argued by way of written submissions. Written submissions dated 1st July 2024 were filed on behalf of the applicants by the firm of Chitwa & Co. Advocates. Counsel submitted that the applicant had presented the claim in court on behalf of his father who is deceased. That the action of the mediator to decree that only the sons of the original owner of the land in question benefit was fundamental mistake during mediation proceeding on the part of the mediator.
 8. That the Respondent was readily available with the Mediation settlement agreement which was never supplied to the applicant imputing collusion. That the push by the Respondent to have the report adopted clearly indicate that there was a clear notice on the part of the Respondent to have the matter concluded at this stage to the disadvantage of the applicants. That the court should take judicial notice of the fact that once the Mediation Settlement Agreement is adopted as an order of the court the same cannot be appealed against and that this disadvantages the Respondent. That it must be noted that the court was seized with further partial evidence of the proceedings pointing towards a long rooted dispute between the parties. That the import of Rule 39(3) of the *Civil procedure (Court Annexed Mediation Rules 2022)* permits the applicant to move to court to set aside the Mediation Settlement Agreement. That a forced Mediation Settlement Agreement cannot amount to a settlement. Counsel urged the court to allow the application.
 9. Witten submissions dated 24th June 2024 were filed by the firm of G. Imbaya Law Advocates on behalf of the Respondents. Counsel submitted that after the mediation session held on 9th February 2024 at Vihiga Law courts parties came to an agreement that was filed herein. Counsel raised 2 issues for trial. Firstly, whether the application is fatally defective and secondly whether the plaintiffs have met the threshold for granting the order sought.
 10. Counsel submitted that under Rule 39(3) of the Rules it is the order or decree arising from the mediation settlement agreement that can be set aside. That in the present case there is no order or decree



to be set aside. That there is no law providing for settling aside of mediation settlement agreement. That the application is premature and totally defective and that the same should be struck out.

11. On whether or not the application meets the threshold for granting the orders sought Counsel submitted that under Rule 39(3) a party has to demonstrate that he or she did not know of the misconduct, fraud or mistake at the time of execution of the agreement and that further the mistake is one that affected the process and outcome of the mediation. That the plaintiffs have not mentioned in their Affidavits of the fact that they did not know about the fundamental mistake that led to a one-sided agreement as submitted by their Counsel. That they further do not mention at what stage they got to know about the alleged fundamental mistake. That the applicant have not met the threshold required in granting the orders sought. Counsel urged the court to dismiss the application with costs.
12. I have considered the application, Supporting Affidavit and annexures, the contents of the Replying Affidavits and annexures thereto and the submissions made.
13. It emerges from the facts of the case that after part hearing of the evidence, an order was made on 5/2/2024 referring the matter to mediation via court Annexed Mediation. It is evidence that the mediation took place and a document dated 9/2/2024 titled settlement agreement filed in court on the same date by the mediator.
14. The application is stated to be brought pursuant to the provisions of Rule 39 of the mediation Rules. Rule 39 makes provision for setting aside of an order or decree arising out of a Settlement Agreement 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 the 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 on 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.”



15. What this rule provides for is the settling aside of the order or decree arising from Mediation settlement agreement. The rules do not provide for setting aside of the Mediation Settlement agreement. Rule 33 and 34 envisage a situation where the next step after failing of the Mediation Settlement Agreement or the mediators report is adoption thereof by the court.
16. To that extend, I am in agreement with the submissions by Counsel for the Respondent that the application is premature, having been filed before, there is in the matter, an order or decree drawn on the basis of the mediator's report.
17. That aside, even if the application had not been pre-mature, the ground upon which the same is made have not been proved. The applicant claims that there was fundamental mistake on the part of the mediator and collusion. However, those have not been proved. The 1st applicant signed the mediation settlement agreement.
18. The applicants have not demonstrated that there was anything unconscionable, unequitable or unfair in the agreement.
19. I find that the application lacks merit and hereby dismiss it. No order as to costs. I hereby adopt the mediation settlement agreement as a judgment of the court.
20. Orders accordingly.

JUDGEMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 19TH DAY OF SEPTEMBER, 2024 AND VIRTUALLY.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

Chitwah for the Plaintiffs/Applicants.

No appearance for the Defendants/Respondents.

