



Agutu (Suing as the administrator and personal representative of the Estate of Akuku Oyicho (Deceased) v Ombewa & 4 others (Miscellaneous Civil Application E019 of 2022) [2023] KEELC 837 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E019 OF 2022
E ASATI, J
FEBRUARY 16, 2023**

BETWEEN

DAN OTIENO AGUTU (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF AKUKU OYUCHO (DECEASED) APPLICANT

AND

**DISHON OMBURE OMBEWA 1ST RESPONDENT
CHARLES VINCENT ONDUU 2ND RESPONDENT
JOSEPH OMBEWA OJUNGA 3RD RESPONDENT
LAND REGISTRAR KISUMU 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. This ruling is in respect of the notice of motion application dated June 16, 2022 filed on behalf of Dan Otieno Agutu the applicant herein. The application seeks for orders that the mediation settlement dated 9/5/2019 be set aside and that the suit be set down for hearing. The application is brought pursuant to the provisions of section 1A, 1B, 3A of the *Civil Procedure Act* and order 51 rule 1 *Civil Procedure Rules* cap 21 laws of Kenya.
2. The applicant's case as contained in his supporting affidavit sworn on June 10, 2022 is that sometimes on August 7, 2019, the subject suit was referred to a mandatory court annexed mediation. That on February 7, 2019 he met with members of his family and agreed on facts in issue and discussed the best way to go about the mediation. That on 9/5/2019 together with the 1st defendant he attended court annexed mediation session and handed over the family agreement to be adopted as the mediation



settlement. That when he saw the mediation settlement report later, he discovered that the same was not in accordance with what they had agreed with the family members and the respondents. That on December 13, 2019 the court ordered that the file be referred back to the mediator for amendment of the mediation settlement. That one (1) year has elapsed since the amendment was ordered to be done. That it is only fair and just that the mediation settlement be set aside and the matter be set down for hearing. That allowing the application will not occasion any prejudice to the Respondent.

3. Written submissions were filed on his behalf of the applicant by Omondi Abande & Company Advocates acting for him. Counsel submitted that although the applicant has not cited fraud or coercion in signing the mediation settlement agreement, that he is a layman and had no advocate when signing the agreement. Relying on the case of *Flora N Wasike v Destima Wamboko* (1988) eKLR, counsel for the applicant submitted that the guiding principles for setting aside consent judgment or orders are that the same can only be set aside on grounds which could justify setting aside of a contract.
4. The application was opposed. It was the 1st respondent's case that the application is frivolous, and a gross abuse of the court process, that the allegations that the mediation settlement report failed to capture what was agreed upon by the family members was a lie. That the mediation settlement report filed in court is the true, valid and consented settlement that the applicant agreed and appended his signature to. That it is not true that a meeting was held on the February 7, 2019. That the document marked DOA-1 annexed to the supporting Affidavit was not authentic. That the court annex mediation had succeeded, the report dated 9/5/2019 filed in court and adopted in case No ELC 401/2018 between the parties herein without any complaint. That the mediation exercise was conducted procedurally. That the application is a plan by the applicant meant to delay interfere and deter the defendants from enjoying the fruits of the consent order. He prayed that the application be struck out.
5. Written submissions were filed on behalf of the 1st Respondent by Ben Oduol Nyanga & Company advocates acting for him. Counsel submitted that the application does not meet the threshold for setting aside consent orders. Counsel relied on the case of *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* (1980) eKLR wherein it was held that

“... *prima facie* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings 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 materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.”

That the applicant has not come to court with clean hands and that the issues in controversy were settled through the mediation process.

6. The 4th and 5th respondents did not respond to the application.
7. I have considered the application, the replying affidavit and the submission made. There is no allegation of fraud or coercion. From the affidavits filed, it is clear that the matter was referred to mediation by consent of the parties. The applicant does not deny attending and voluntarily participating in the mediation process. He does not deny signing the mediation settlement agreement. There's no evidence of misconduct on the part of the mediator(s).
8. There is no explanation why the application herein was not filed in the suit from which the mediation process emanated and wherein the mediation settlement agreement was filed. I find that the Application dated June 16, 2022 lacks merit and dismiss it with costs to the 1st, 2nd and 3rd respondents.



Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 16TH DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Maureen - Court Assistant.

For the applicant

For the 1st Respondent

For the 2nd, 3rd, 4th and 5th Respondents.

