Ibrahim v Muhsin & 3 others (Civil Suit 51 of 2021)
[2023] KEHC 27592 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 51 OF 2021

F WANGARI, J

NOVEMBER 24, 2023

BETWEEN

NEDIM MOHAMED IBRAHIM ..... PLAINTIFF

AND

ABDULKARIM SALEH MUHSIN ..... 1ST DEFENDANT

ZUMZUM INVESTMENT LIMITED ..... 2ND DEFENDANT

AKABA INVESTMENT LIMITED ..... 3RD DEFENDANT

ACIENT INLAND SEAS LIMITED ..... 4TH DEFENDANT

JUDGMENT

1. In the Plaint dated 10th May, 2021 drawn by Paul Mwangi & Company Advocates, the Plaintiff prayed for reliefs as follows;

    a. An order of by way of Specific Performance of the Mediation Agreement and Resolution dated 7th May, 2017.

    b. Damages in lieu of or in addition to specific performance.

    c. Costs of the suit

    d. Interest

    e. Any other remedy that the court deems fit and just.

2. The Plaintiff averred that the 1st Defendant was his business partner, while the 2nd, 3rd and 4th Defendant were enjoined to the suit by virtue of the disputes between the parties and the Resolutions agreed. In the course of the business partnership, the Plaintiff and the 1st Defendant acquired various business enterprises and properties within Mombasa County and elsewhere in the country.

3. While at it, disputes arose resulting to various legal proceedings against each other and whose details were as per paragraph 12 of the Plaint. Both parties being desirous of resolving the said disputes entered into a Mediation Agreement and Resolution dated 7th May, 2017 and which was executed by the said parties.

4. The Defendants filed separate Statements of Defence all dated 22nd June, 2021 drawn by the firm of Ahmednasir, Abdullahi LLP Advocates. They denied the contents of the plaint and prayed that the Plaintiff's suit be struck out with costs to the Defendants.

5. The Defendants averred that this court had no jurisdiction to entertain the matter as filed. They also averred that the suit was res-judicata and/ or sub-judice, and without prejudice, it was an abuse of court process and failed to disclose any cause of action and hence it ought to be dismissed.

6. On the Mediation Agreement, the Defendants stated that the same was to be filed and adopted as the orders of the court in the six (6) pending suits save for HCCC No. 93 of 2016. There was also an express/ or implied term that the companies affected by the Mediation Agreement were to pass a Resolution in order to adopt or ratify the terms of the agreement. The 2nd, 3rd and 4th Defendants did not pass such resolution. Further, the said Defendants were not privy to the agreement, hence it could not be enforced against them.

7. Failure to have the Mediation Agreement adopted in court as per Resolution 17 led to a mutual decision to abandon the implementation of the agreement, hence proceeding with the pending suits. The Plaintiff was therefore estopped from preferring this suit.

8. The Plaintiff was accused of misrepresentation and failure to disclose material facts. The Plaintiff failed to disclose that even after the Mediation Agreement was signed, he refused to hand over the original title documents to the mediators for purposes of effecting the agreement. Further, despite the agreement, disputes continued between the parties, and by abandoning the agreement, both parties actively pursued the suits pending before court.

9. Finally, the Defendants averred that this suit was filed four (4) years after the Mediation Agreement, and after various suits had progressed and rulings and/ or judgments delivered with finality, hence it was an afterthought and merely projected at stalling the wheels of justice, and pre-empting the inevitable process of execution.

Plaintiff's evidence

10. The Plaintiff called one witness. The witness was the Plaintiff, Nedim Mohamed Ibrahim. His witness statement dated 30th April, 2021 was adopted as his evidence in chief. The contents of the statement were similar to the contents of the Plaint as stated herein above.

11. The Plaintiff stated that the 1st Defendant was his co-director in the 2nd, 3rd and 4th Defendant companies. The 1st Defendant was the majority shareholder in the said companies. After a dispute arose between the Plaintiff and the 1st Defendant, they had a Mediation Agreement dated 7th May, 2017 which he produced as an exhibit.

12. The plaintiff further added that he suffered a heart attack later in year 2017 where he sought medical attention in Kenya, the USA and Ethiopia. He later had another heart attack in year 2018 and he was referred back to Kenya and the USA. As he awaited to go to the USA for further treatment, the corona pandemic came and there were no appointments for visa processing taking place.

13. Due to his medical condition, he was advised by his doctor to isolate himself as he was a "High Risk" person. It was after he had a 'corona vaccination' (Covid 19 vaccine) that he came back to Kenya to follow up on his matters. He said his lawyer was still appearing in court on his behalf.

14. He prayed that the Mediation Agreement be enforced as it would resolve all the other pending suits between him and the Defendants.

15. On cross-examination, the Plaintiff said that he was represented in the pending suits The Mediation Agreement was done in good faith and he denied that he refused to cooperate with the mediators. He had surrendered the documents to the mediators but they were returned to him.

16. The Plaintiff admitted that he did not attend to the suits pending, for about 2 years due to the corona pandemic. In reference to court pleadings, documents, rulings and or orders filed as part of Defendant's list of documents, he admitted that he was represented by his advocates in the said matters. The disputes are yet to be resolved. He attributed the delay in following up this matter due to the heart attack he suffered.

17. On re-examination, he stated that he had not withdrawn his complaint against the 1st Defendant as per clause 16 of the Agreement. He said that if the Mediation Agreement was enforced, all the pending issues with the Defendants would be resolved. That marked the close of the Plaintiff's case.

Defendant's evidence

18. The Defendants called 2 witnesses. Abdulkarim Saleh Muhsin (DW 1), the 1st Defendant herein had his witness statement dated 13th July 2021 adopted as his evidence in chief. The list of documents dated 15th July 2021 and further 24th February 2023 were produced as exhibits.

19. On cross-examination, the 1st Defendant said that the Mediation Agreement was invalid as it had not been adopted by the court and hence, no clause was binding upon them. He admitted that he was the majority shareholder in the 2nd, 3rd and 4th Defendant companies. He added that clause 3 of the Resolution (In respect to Mlolongo properties) was amended by a court ruling after a dispute arose about the properties.

20. Even though he did not file a counterclaim, he was demanding his shares as per the court ruling. Just like the Plaintiff, he also admitted that he had not withdrawn his complaint against the Plaintiff as directed by the court. He denied that he had lodged a complaint against the Plaintiff with the Directorate of Criminal Investigations (DCI) a week prior to the hearing of this suit.

21. On re-examination, he said as at the time of signing the agreement, there were pending suits before court between him and the Plaintiff. The suits were compromised by signing of the agreement. He blamed the Plaintiff for failure to handover the necessary documents to the mediators. Both parties agreed to go back to court even after the mediation agreement.

22. The Defendants second witness, Abdulbasit Swaleh Mohsin (DW 2) adopted his witness statement as his evidence in chief. He testified that he held 25% shares in the 3rd and 4th Defendant companies. All the companies' decisions were made via resolutions. He said he was not aware of the Mediation Agreement but he admitted that he was aware of the disputes involving the companies. That marked the close of the defence case. Parties proposed to file submissions.

Plaintiff's submissions

23. They are dated 14th August, 2023. The Plaintiff proposed four (4) issues for determination as follows: -

i. Whether the Mediation Agreement and Resolution dated 7th May, 2017 is enforceable;

ii. Whether the 1st Defendant has the Authority to commit the 2nd, 3rd and 4th Defendants to mediation;

iii. Whether the 2nd, 3rd and 4th Defendants are subject to the Privity of Contract Rule in so far as the Mediation Agreement and Resolution dated 7th May, 2017 is concerned;

iv. Whether the Defendants are entitled to object to the enforcement of the Mediation Agreement and Resolution.

24. On the first issue, the Plaintiff submitted that the Mediation Agreement and Resolution dated 7th May, 2017 was a contract which the court ought to enforce. The agreement was valid and its legality was not in dispute. It was pointed out that the 1st Defendant was unable to point out any clause in the agreement which he thought was unenforceable and that he could not raise any legal excuse why he should not fulfill his contractual obligations under the Resolution. The Court of Appeal decisions in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR and Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Enwicklungsgellschaft (Deg') & Others [2011] eKLR were relied upon.

25. It was submitted that the Mediation Agreement and the Resolution dated 7th May, 2017 were duly executed by the Plaintiff and the 1st Defendant with an intention to create legal obligations. No notice terminating the agreement had been issued and that there was no intimation that the 1st Defendant wished not to be bound by the terms of the agreement. Paragraph 8.2 of the Mediation Agreement dated 7th May, 2017 was referred to as entitling any party to the agreement to enforce the settlement by judicial proceedings. It was thus urged that an order of specific performance ought to issue.

26. On the second issue, it was submitted that the 1st Defendant was the majority shareholder in the 2nd, 3rd and 4th Defendant. The shareholding percentage was submitted as 70%, 75% and 75% in respect of the 2nd, 3rd and 4th Defendants respectively. Therefore, the 1st Defendant was in total control of the 2nd to 4th Defendants as per the Plaintiff. Clause 3 of the Mediation Agreement was referred to.

27. Therefore, the Plaintiff submitted that by executing the Mediation Agreement, the 1st Defendant made a clear and unequivocal representation that he had the authority to bind the 2nd to 4th Defendants and thus the 1st Defendant was estopped from pleading against the representations.

28. It was further submitted that the court ought to lift the corporate veil to determine that the person it is dealing with is the 1st Defendant and not the 2nd to 4th Defendants. It was urged that the 2nd to 4th Defendants acted as agents of the 1st Defendant. The cases of Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others [2019] eKLR and Riccati Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR were cited in support of this proposition.

29. It was submitted that this court ought to pierce the corporate veil to the 2nd, 3rd and 4th Defendants on account of agency. As a majority shareholder, it was said that the 1st Defendant had effective control and thus the 2nd to 4th Defendants ought to be held as agents of the 1st Defendant. It was additionally pointed out that the mediation agreements expressly stipulated that the 1st Defendant had the authority to bind the 2nd to 4th Defendants.

30. Concluding on this issue, the Plaintiff submitted that equity acts in personam and that the Mediation Agreement and Resolution dated 7th May, 2017 bound the 1st Defendant. This court as a court of equity ought to enforce the agreement on the 2nd to 4th Defendants by binding the 1st Defendant to obedience.

31. On the third issue, the Plaintiff submitted that the 2nd to 4th Defendants were not subject to the privity rule to the Mediation Agreement and the Resolution dated 7th May, 2017. It was urged that it was the intention of the parties that the 2nd to 4th Defendants be bound by the terms of the Mediation Agreement and Resolution. The case of Mark Otanga Otiende v Dennis Oduor Aduol [2021] eKLR was relied upon in support of this proposition.

32. On the fourth issue, the Plaintiff took issue with the defence position that the Mediation Agreement and Resolution was no longer binding due to mutual abandonment. Relying on clause 20 of the Resolution, it was submitted that any variation to the Mediation Agreement must be done by mutual agreement and be in writing. Clause 9.1 (b) of the Mediation Agreement was equally referred to for the proposition that termination by any of the parties required a written notice of termination to the other parties as well as the mediators.

33. According to the Plaintiff, no written agreement of variation of Mediation Agreement was produced in court by the 1st Defendant as proof that parties agreed to mutually abandon the agreement. The Plaintiff submitted that the parole evidence rule applied to the effect that any evidence contrary to the Mediation Agreement and Resolution ought not to be admitted. Section 98 of the *Evidence Act* was relied upon. The case of Universal Education Trust Fund v Monica Chopeta [2012] eKLR was cited in support as well.

34. In totality, the Plaintiff prayed that the orders sought in the plaint dated 10th May, 2021 be granted as prayed.

Defendants' Submissions

35. The 1st to 4th Defendants' (hereinafter referred to as the Defendants) submissions are dated 1st September, 2023. The Defendants gave a background of the nature of the relationship and how the disputes arose. The various cases evidencing the disputes were set out. The existence of the Mediation Agreement was admitted. Nevertheless, the Defendants opined that the implementation thereof was frustrated by the Plaintiff. It was submitted that the parties mutually agreed to abandon the agreement and release each other from the rights and obligations under the agreement.

36. The Defendants pointed out that as a result of the abandonment of the agreement, parties agreed to proceed with the pending suits and that determinations in some of those suits have been made and others are pending determination. Further, it was stated that as a result of the abandonment of the agreement, the 1st Defendant was unable to obtain the necessary resolutions of the 2nd to 4th Defendants. It was equally pointed out that this court lacks the necessary jurisdiction by virtue of it being res judicata and/or sub judice.

37. It was submitted that there was no authority given to the 1st Defendant to engage in the mediation process and that no resolution was passed by the 2nd to 4th Defendants ratifying the 1st Defendant's actions or even adopting the terms of the agreement or any of the resolutions thereof. The 2nd to 4th Defendants submitted that there existed no privity of contract between them and the Plaintiff. The Defendants proposed the following issues for determination: -

    i. Whether the agreement dated 7th May, 2017 is capable of being enforced;

    ii. Whether there is privity of contract between the Plaintiff and the 2nd, 3rd and 4th Defendants in relation to the agreement;

    iii. Whether the Plaintiff is entitled to the equitable remedies sought;

iv. Who should bear the costs of this suit

38. On the first issue, the Defendants did not contest the existence of the mediation process and the intent thereof which was to resolve the disputes and differences between the Plaintiff, 1st Defendant and their associated companies. There was equally no contest that the issues and differences that they strived to resolve were expressed through the pending suits. It was also submitted that the intention of the Plaintiff and the 1st Defendant were to bind their associated companies.

39. The Defendants submitted that the question of whether or not the 1st Defendant had the authority or power to bind the 2nd to 4th Defendants was both a question of fact and law. It was the defence contention that despite the execution of the agreement, differences and disputes continued to persist. This was because the Plaintiff was uncommitted to the implementation of the agreement. Various letters and/or communications were referred to buttress this position. Among them were the letters dated 19th May, 2017, 13th June, 2017 and 21st August, 2017.

40. It was submitted that the contents of the communications produced in court was not rebutted by the Plaintiff in any manner. It was urged that the Plaintiff did not demonstrate or give any evidence of non-compliance on the part of the Defendant. Having not complied with the terms of the agreement, this court of equity could not entertain a claim for equitable relief. The case of Alghussein Establishment v Eton College [1991] 1 ALL ER was cited for the proposition that a party ought not to benefit from his own breach.

41. It was pointed out that the attempts by the mediators to salvage the situation did not bear any fruits. They attempted to have parties execute addendums with a view of resolving the matter but the parties failed to agree on the terms of the addendums. It was the defence submissions that when it became apparent that parties could not reach a compromise, there was mutual agreement to abandon the agreement and release each other from their rights and obligations under the agreement.

42. Making reference to certain averments in an affidavit filed in ELC Case No. 248 of 2014, the Defendants submitted that negotiation process collapsed. It was submitted that it was an abuse of the court process for the Plaintiff to attempt to urge a contrary position to that which he presented before another court. It was urged that the case ought to be dismissed in limine. The Court of Appeal decision in Kivanga Estates Limited v National Bank of Kenya [2017] eKLR was cited.

43. The defence submit that a party should not be allowed to approbate and reprobate. The Plaintiff ought not to be allowed to blow hot and cold. The decisions in Behan & Okero Advocates v National Bank of Kenya [2007] eKLR and Republic v Institute of Certified Public Secretaries of Kenya Ex Parte Mundia Njeru Geteria [2010] eKLR which cited other authorities among them Banque De Moscou v Kindersley [1950] 2 ALL ER 549 were relied upon for the above proposition.

44. The defence submitted that it is a principle of law that an advocate has a general authority to even compromise a suit on behalf of his client if he acts bona fide. An advocate can equally depone on matters within his knowledge. Since the filing of the application in ELC Case No. 248 of 2014, the Plaintiff had not moved the court to contest the acts of Counsel assuming the same were done without instructions. The Plaintiff's actions were slammed as scandalous and abused of court process.

45. The Plaintiff's response that he was ailing and not in a position to instruct his advocates was dismissed on account that no evidence had been presented before the court to demonstrate that he was incapacitated on account of ailment or otherwise. The maxim he who comes to equity must do so with clean hands was cited for the proposition that a party seeking equitable remedies ought to do equity and not lie.

46. The Defence reiterated that parties agreed to abandon the agreement and to proceed with the prosecution of the various suits. Those suits were said to have progressed and prosecuted and whereas some are pending determination, others have been concluded culminating in orders and decrees. It was indicated that the Plaintiff was well aware of all the proceedings relating to the various suits alluded to. The various suits were highlighted together with their status and the orders issued.

47. It was submitted that the Plaintiff's argument that there was no abandonment or that he was not aware of the prosecution of the various suits is deceitful and ought not to be countenanced. Further, the failure to make material disclosure of the material facts disqualified the Plaintiff from the equitable arena. The case of Halima Haji Sarah v Multiple Hauliers (E.A) Limited & Another [2022] eKLR was relied upon for the above proposition.

48. On reliance on clause 9 of the agreed, it was submitted that it was misguided and misplaced since the provisions contemplated a situation where the move or intent to terminate was by one party to the agreement. They did no contemplate a situation where parties freely and mutually agreed to terminate the agreement.

49. On clause 20, it was submitted that as a matter of law, an agreement can be terminated or extinguished by way of abandonment. The case of Dyna-Jet Pte Ltd v Wilson Pte Ltd quoted in Euromec International Limited v Shandong Taikai Power Engineering Company Limited [2021] eKLR where it was recognized that an arbitration agreement is inoperative when it ceases to have effect as a binding contract. It was submitted that this can occur as a consequence of various contractual doctrines such as discharge by breach, by reason of waiver, estoppel, election or abandonment.

50. It was summited that the decision to abandon having been mutually arrived at, no notice was necessary under the provisions of clause 9 and that the provisions of clause 20 was of no consequence. Therefore, it was contended that the Plaintiff was estopped from denying these obvious facts or seeking to enforce an agreement that has long been extinguished on account of abandonment.

51. The Plaintiff having participated in all proceedings post agreement, it was the Defendants' contention that the Plaintiff acquiesced to waiver and abandonment of his right to pursue purported enforcement of the agreement. The case of Imam v Life (China) Company Limited & Others [2021] QSC 124 where the court analyzed the doctrine of abandonment at length was cited.

52. The Court of Appeal's decision in Bilita Wambui Kiarie v Embakasi Ranching Company Limited [2022] eKLR which had cited Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR was equally relied upon. Section 120 of the *Evidence Act* and the Court of Appeal decision in Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR were relied upon on the issue of estoppel and laches.

53. It was further submitted that the current proceedings are nothing but the Plaintiff's attempt to have another bite at the cherry and to pre-empt the execution of the decrees and orders already issued against him. It was urged that the Plaintiff has no justiciable claim and that his present suit is an abuse of court process. The Court of Appeal decision in Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR on the concept of abuse of court process was relied upon.

54. On the issue of res judicata, it was pointed out that HCCC No. 25 of 2015 and HCCC No. 116 of 2016 having been determined by a court of competent jurisdiction, the Plaintiff cannot purport to have those issues re-litigated by seeking to enforce a non-existent agreement. Those matters are now res judicata. The decision in Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) v Permanent Secretary, Ministry of Energy & 17 Others [2016] eKLR was relied upon.

55. The decision in Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another, Kinyanjui Njuguna & Company Advocates & Another (Interested Parties) [2020] eKLR was cited on the elements that need to exist for a bar of res judicata to be effectively raised. The Defendants submitted that the principle of finality of litigation has to be respected.

56. Regarding ELC No. 248 of 2014, HCCC No. 122 of 2014 and HCCC No. 130 of 2012, it was pointed out that the said suits were now active before other courts of concurrent jurisdictions. It was stated that the issues relating to the said suits cannot be introduced in court through a fresh action premised on the purported agreement as doing so would be contrary to the sub-judice doctrine and an abuse of court process. Reliance was placed in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya [2020] eKLR.

57. On the issue of privity of contract, the Defendants submitted that nothing was exhibited before the court to demonstrate any authority from the 2nd, 3rd and 4th Defendants allowing the 1st Defendant to negotiate or engage with the Plaintiff on their behalf. It was submitted that the 1st Defendant's desire was to ultimately persuade his associated companies to pass appropriate resolutions endorsing his agreement with the Plaintiff but following the abandonment of the agreement, he did not secure the necessary endorsement or ratification from the 2nd to 4th Defendants.

58. It was highlighted that DW2 confirmed that no authority was issued to the 1st Defendant nor did the other Defendants who are companies pass any resolution adopting or ratifying the actions of the 1st Defendant or the contents of the subject agreement or any of the resolutions thereof.

59. Submitting on the aspect of a company being a separate legal entity from its shareholders or directors, it was urged that the 1st Defendant cannot be presumed to be an agent of the 2nd, 3rd and 4th Defendants merely because he is or may be the majority shareholder in the three companies. The case of Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Another [2014] eKLR was cited in support of this proposition.

60. It was the Defendants' position that a resolution of the 2nd to 4th Defendants was required to authorize the 1st Defendant to negotiate or engage on their behalf. No resolutions were ever passed and as such, no privity of contract existed between the Plaintiff and the 2nd to 4th Defendants. Reliance was placed on the Court of Appeal decision in Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR on the issue of privity of contract.

61. It was further submitted the Plaintiff invitation to pierce the corporate veil of the 2nd to 4th Defendants would be tantamount to ask the court to violate cardinal principles of law. It was pointed out that there was no prayer for lifting of the corporate veil and that submissions do not amount to a pleading. Reliance was placed in the case of Ukwala Supermarket v Jaideep Shah & Another [2022] eKLR.

62. On whether the Plaintiff was entitled to the equitable remedies sought, it was submitted that the orders sought were not merited and ought not to be granted. No evidence was laid to warrant any award of damages. It was submitted that the suit is not informed by genuine desire to pursue justice. It is informed by other ulterior motives contrary to the dictates of section 1A of the *Civil Procedure Act*. Reliance was placed in the decisions in Peter George Antony D'Costa v Attorney General & Another [2013] eKLR and Kivanga Estates Limited v National Bank of Kenya Limited.

63. On costs, the Defendants prayed that the suit be dismissed with costs and that costs payable to the 2nd to 4th Defendants be on a higher scale.

Analysis and Determination

64. I have considered the pleadings, the rival submissions, authorities cited and the law. Both parties framed issues for determination and having reviewed them, this court adopts the issues as framed by the parties.

65. On whether the Mediation Agreement and Resolution dated 7th May, 2017 was enforceable, this court notes that the agreement and the resolution formed the basis of the relationship between the parties towards resolving their disputes. These documents were the primary contractual documents.

66. Being the contract between the parties, the court's duty is clearly delineated. It is not the duty of the court to re-write what parties agreed but rather, to give effect to their intention thereof. This is what the Court of Appeal decreed in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR when it held as follows: -

> "...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved..."

67. In *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000*) (unreported), the court noted as follows: -

> "...It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain..."

68. This principle has been restated by the Court of Appeal in the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR. The Superior Court after reviewing case law on the subject stated that it was "...alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved..."

69. The essential components of a contract were observed by Harris JA in Garvey v Richards [2011] JMCA 16 as quoted by the court in Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] eKLR. It was held that it ought to ordinarily reflect the following principles: -

> "...It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable, an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence..."

70. A review of the agreement and resolution dated 7th May, 2017 leaves no doubt that the three basic rules highlighted in the above decision were met. The Plaintiff and the 1st Defendant entered into an agreement which clearly confirms that parties intended to enter into contractual relationship towards settling their differences. The resolution contains the consideration. Clause 21 of the resolution settles all questions as relates to the parties' intention and I hold that there was a meeting of the minds (consensus ad idem).

71. No single clause in the agreement and the resolution was pointed out as being unenforceable. In their submissions especially at paragraph *18*, the Defendants appeared to suggest that the agreement was not lawful. The Defendants never pointed out any clause in the agreement that was deemed unlawful or illegal for it to be considered unenforceable. It is the court's view that the agreement and the resolution dated 7th May, 2017 is enforceable and I so hold.

72. On the issue of whether the 1st Defendant had the authority to bind the 2nd to 4th Defendants, the Plaintiff placed reliance on clause 3 of the agreement. For the Defendants, it was submitted that without any resolutions by the 2nd to 4th Defendants, the 1st Defendant could not bind them to the ensuing agreement. The law on separate legal personality of a company is settled. The House of Lords' decision in Salomon v Salomon [1897] AC 78 is still good law today as it were in 1897.

73. The fact that the 1st Defendant was a majority shareholder in the 2nd to 4th Defendants did not displace the separate legal personality of the companies. In Victor Mabachi & Another v Nurturn Bates Ltd [2013] eKLR, the Court of Appeal held as follows: -

> " ...A company as a body corporate is a persona jurisdica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil..."

74. Be that as it may, were the parties alive to the existence of other companies when they signed the agreement and resolution dated 7th May, 2017? The answer to this question is found at clause 3 of the agreement which I reproduce hereunder: -

> " The parties herein unequivocally undertake and guarantee that they have the express authority of the companies and other parties forming part of this dispute and have the authority to bind the same vide the resolution they might be passed herein and the resolutions passed herewith shall bind the said the said companies and third parties as if executed by themselves." (Emphasis added)

75. This was the parties understanding when they executed the agreement and the resolution. There is no doubt that when the Plaintiff and the 1st Defendant were signing the agreement and the resolution, both being directors in the same companies, they were clear in their minds that their actions were to bind the respective companies.

76. The Defendants submitted that without the 2nd to 4th Defendants executing resolutions authorizing the 1st Defendant to engage the Plaintiff, the agreement and resolution dated 7th May, 2017 were not binding upon them. This court is unable to agree with the Defendants on this line of submissions.

77. The resolution to be passed was to be done "herein" and "herewith." These adverbs connote that the resolution or resolutions anticipated were to be done in the same transaction as the signing of the agreement. There is a resolution attached to the agreement and which resolution was executed on the same date as the agreement. Clearly, it was not open for either party to go and seek any other resolution from any other party to bind their companies to the agreement. I am thus satisfied that both the Plaintiff and the 1st Defendant's actions were binding on the companies.

78. Before turning to the next issue, the Plaintiff submitted that the court ought to pierce the corporate veil of the 2nd to 4th Defendants. The Halsbury's Laws of England, 4thEdn para. 90 addresses the issue of piercing the veil of incorporation and states as follows: -

> "...Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted..."

79. Being an equitable remedy, it behooves a party asserting such a claim to demonstrate or lay sufficient evidence that the corporate veil of a company ought to be pierced or lifted. In Lucy Mukembura Kimani v Nzuri Feeds Suppliers Ltd [2021] eKLR, the court held as follows: -

> "...In Kenya, courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company's alter egos have acted in fairly egregious manner. This is because Courts understand the benefits of limited liability as expressed in the statute..."

80. Therefore, it is a strong thing for a court of equity to allow piercing of corporate veil arbitrarily without a proper basis being made. The Plaintiff submitted that the reason for seeking piercing of corporate veil of the 2nd to 4th Defendants was due to the fact that the 1st Defendant was the majority shareholder in the said companies.

81. The fact that a party is a majority shareholder is not a ground to pierce the corporate veil of a company. Indeed, the Defendants posit, and correctly so that the issue of piercing the corporate veil was only sneaked in through submissions. It is trite that submissions do not take the place of evidence. (See the Court of Appeal decision in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR). The Plaintiff's submissions on this issue are thus for rejection.

82. On the third issue on whether the 2nd to 4th Defendants are subject to privity rule in relation to the mediation agreement and resolution, it is trite that a contract only binds parties to it. In its classical rendition, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

83. In Dunlop Pneumatic Tyre Co Ltd -versus- Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principle thus: -

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

84. In Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR, the Court of Appeal quoted with approval the Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110 which states as follows: -

> " As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

85. Based on the above authorities, it is thus settled that it is only the contracting parties that can sue on the subject contract. However, in the persuasive decision in Mark Otanga Otiende v Dennis Oduor Aduol [2021] eKLR, it was held that there exist exceptions to the privity rule. The court observed as follows: -

> " ...An exception to the Privity Rule suffices where the contracting parties clearly intended to benefit a third party from their agreement and the third party would be able to rely on and or enforce the agreement if it is not carried out properly..."

86. This is the situation that obtains in the present case. The Plaintiff and the 1st Defendant clearly intended to benefit the companies who were not parties to the mediation agreement and resolution. This is clearly discerned from clause 3 of the agreement. This being the case, it is the court's finding that the privity rule applied to the 2nd to 4th Defendants but under the exception.

87. On whether the Defendants are entitled to object to the enforcement of the agreement and resolution and the issue of abandonment, the Defendants submitted that parties mutually agreed to abandon the agreement and release each other from their rights and obligations under the agreement. The Defendants relied on a supporting affidavit filed in ELC Case No. 248 of 2014 sworn by the Plaintiff's Counsel. Paragraph 8 of the said affidavit was reproduced for the proposition that the Plaintiff had confirmed that the negotiation process had collapsed.

88. However, on cross examination, the Plaintiff stated that he was unwell from late 2017 to 2018 as he developed two (2) heart attacks. He was thus out of the country receiving medical attention. Though he did not deny that the named advocate was his Counsel, he was not privy of the averments. Though no medical records were adduced to support the Plaintiff's assertions that he was unwell, there was no contention from the Defendants and thus this court is prepared to accept that the Plaintiff was unwell.

89. It is true as submitted by the Defendants that an advocate has a general authority to even compromise a suit on behalf of a client as long as he acts bona fide. However, in the present case, it was contended that the Plaintiff was unwell as at the time the application in ELC Case No. 248 of 2014 was filed. It can be reasonably presumed that the contents of the affidavit in the application in ELC Case No. 248 of 2014 may not have been read to the Plaintiff before the same was filed since he was not the deponent.

90. The question thus is, was the agreement abandoned? The parties' intentions were all contained in the agreement and the resolution therein. Clause 9 of the agreement addressed the issue of termination. The agreement clearly stipulated the circumstances when the mediation would terminate. It would terminate upon signing of a settlement agreement or by either party giving a termination notice in writing.

91. The agreement and the resolution being the documents that guided the relationship between the parties, it was not open for inference. There was no agreement adduced to buttress the assertion that

parties mutually agreed to abandon the agreement and release each other. The Halsbury's Laws of England, 4th Edition, Vol. 12 states as follows: -

> " Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document."

92. The following excerpt from Chitty on Contract 29th Edition Vol. 12 is also relevant: -

> " It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given... so as to add or subtract from, or in any manner to vary or qualify the written agreement... The rule is usually known as "parole evidence" rule. Its operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation."

93. The parties having mutually agreed to resolve their disputes through the agreement and resolution in writing were not allowed to introduce extrinsic evidence in the form of their conduct. If they intended to terminate or vary the agreement, recourse was had to the two (2) documents freely executed. Therefore, the court is not persuaded that the agreement and resolution stood abandoned based on the averments made in ELC Case No. 248 of 2014.

94. The agreement and resolution were well set out. The agreement had identified seven (7) court cases that stood to be resolved with parties performing their part of the bargain. In their submissions, the Defendants stated that some of the cases have been concluded while others are active. In addition to the cases identified, there existed complaints lodged with the Directorate of Criminal Investigations (DCI) by both the Plaintiff and the 1st Defendant. These were equally to be resolved through the mediation.

95. Though it was submitted that some cases have been concluded, no party has demonstrated any prejudice that shall be suffered if they are directed to perform their part of bargain as per the agreement and resolution for the yet to be concluded matters. It shall save on courts time and allow courts to utilize the scarce judicial resources on other matters. This court is guided by the provisions of Article 159 (2) (c) of *the Constitution* where courts have been encouraged to embrace alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...

96. The Defendants submitted that if the reliefs sought are granted, it shall be sub judice for the cases not yet concluded and res judicata for those concluded. There was no contest that some of the cases have been concluded and that the decisions in those cases have not been overturned either on appeal or review. This implies that the parties were satisfied with the verdicts. As such, it would be prudent to have the concluded matters omitted from the talks to be undertaken. Otherwise, the pending cases and complaints ought to be subjected to the process initially intended by parties.

97. Can the court issue an order of specific performance as sought? In Thrift Homes Ltd vs. Kenya Investment Ltd [2015] eKLR, the court held as follows: -

> " ...specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court

then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction..."

98. In this case, both the Plaintiff and the 1st Defendant blamed each other over who failed to perform their end of the bargain. No cogent evidence was placed before the court to ascertain without any iota of speculation on who exactly failed. The court does not seem to find any other adequate alternative remedy and since the Plaintiff moved the court, this is a sign that he is ready and able to complete his part of the bargain so as to give effect to the terms of the agreement and resolution. I thus find favour with the prayer for specific performance.

99. On the prayer for damages, I see no basis to award any as it would be tantamount to stifling the intended mediation.

100. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

101. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.

102. Considering the parties' relationship, the court exercises its discretion by directing that each party shall bear own costs.

103. Flowing from the foregoing, the court makes the following orders: -

a. An order by way of specific performance of the Mediation Agreement and Resolution dated 7th May, 2017 does issue;

b. To give effect to (a) above, I direct the parties, that is, the Plaintiff and 1st Defendant to meet and with the help of their Counsel, agree on how to set the ball rolling towards realizing what they had initially intended;

c. The meeting to be organized as soon as possible but not later that 15th December, 2023;

d. The meeting can take any form recognized, be it physical or virtual;

e. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Paul Mwangi Advocate for the Plaintiff

M/S Wangui Advocate h/b for Muchoki Advocate for the Defendants

Barille, Court Assistant