



REPUBLIC OF KENYA



Paragon Electronics Limited v Steve Kimathi t/a Andrew & Steve Advocates (Civil Suit 38 of 2019) [2023] KEHC 26741 (KLR) (Civ) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 38 OF 2019

CW MEOLI, J

DECEMBER 20, 2023

BETWEEN

PARAGON ELECTRONICS LIMITED PLAINTIFF

AND

STEVE KIMATHI T/A ANDREW & STEVE ADVOCATES DEFENDANT

RULING

1. The matter for determination by this court is the purport and effect of the undated Deed of Settlement executed by the respective parties, to the instant proceedings. However, before delving into the same, it would be pertinent to set out the history of the matter. On 05.03.2019 Paragon Electronics Limited (hereafter the Plaintiff), filed a suit by way of an Originating Summons seeking several reliefs against Steve Kimathi t/a Steve & Andrew Advocates (hereafter the Defendant).
2. Among the reliefs sought were an order to compel the Defendant to forthwith and not later than seven (7) days from the date hereof deliver up to the Plaintiff all papers, filed and documents relating to the following suits :-
 - (1) Arbitration between Yusuf Sharafally Esufali & Amama Yusuf Sharafali Esufali and Paragon Electronics Limited
 - (2) Arbitration between Oussainou and Khadijatou Ngum and Paragon Electronics Limited
 - (3) Paragon Electronics v Yusuf Sharafally Esufali & Amama Yusuf Sharafali Esufali ELC Cause No. 178 of 2017
 - (4) Paragon Electronics Limited v Samsung Electronics Co. Limited HCCC No. 171 of 2009



- (5) Samsung Electronics Co. Limited v Paragon Electronics Limited Court of Appeal Civil Application No. 87 of 2017
- (6) Paragon Electronics Limited v Oussainou and Khadijatou Ngum HCCC No. 215 of 2017
- (7) Fardhouse Adam v Paragon Electronics Limited HCCC No. 468 of 2014
- (8) Esther Adhiambo Ongong & Carlius Osambo Ademba v Paragon Electronics Limited ELC No. 1205 of 2016.

Further that, that the Defendant be declared to have been given the Plaintiff's consent to change its representation in the above listed matters on 21st September 2018; and that the Defendant be reprimanded by the court for his conduct; and that the costs of the suit be awarded to the Plaintiff on full indemnity basis.

3. On 29.04.2019 the Plaintiff lodged a request for judgment against the Defendant on grounds that having been duly served with the Originating Summons he failed to enter appearance and file defence within the prescribed period. The request was endorsed on 17.05.2019 and consequently judgment was entered, and an order extracted in respect of the prayers in the Originating Summons.
4. The Defendant thereafter filed a motion dated 30.05.2019 seeking inter alia that the all the ex-parte filings and proceedings in respect of the instant matter including but not limited to the proceedings of 17.05.2019 and the subsequent order against the Defendant and any consequent orders thereafter, be set aside; and for the court to extend the time within which the Defendant could enter appearance and to deem the memorandum of appearance dated 30.05.2019 as properly on record. The Plaintiff opposed the motion by way of Grounds of Opposition dated 24.06.2019 and later filed a Preliminary Objection dated 22.07.2019 in respect of the Defendant's motion. Both the motion and Preliminary Objection were canvassed by way of submissions. Kamau, J. in her ruling delivered on 12.05.2020 allowed the Plaintiff's Preliminary Objection dated 22.07.2019 with costs, as a consequence of which Defendant's motion dated 30.05.2019 stood dismissed with costs to the Plaintiff.
5. Following the ruling of Kamau J , the Defendant filed second motion dated 12.06.2020 seeking inter alia orders that the all the ex-parte filings and proceedings in respect of the instant matter, including but not limited to the proceedings of 17.05.2019 and the subsequent order against the Defendant, and any consequent orders thereafter, be set aside; that the court extends the time within which the Defendant could enter appearance and deem the memorandum of appearance dated 30.05.2019 as properly on record; that in the alternative to the latter, the court declares that the Defendant was not required to enter an appearance as provided for under Order 52 Rule 10 of the *Civil Procedure Rules*; that the Originating Summons be placed before the Judge for hearing and determination; and for the court to issue any other order is deemed fit to meet the ends of justice.
6. The Plaintiff similarly opposed the motion by way of Grounds of Opposition dated 07.07.2020. The Defendant's motion was heard by way of written submissions. In her ruling delivered on 26.01.2021 Kamau, J. allowed the Defendant's motion dated 12.06.2020 the effect being that all the ex-parte filings and proceedings in respect of the instant matter including but not limited to the proceedings of 17.05.2019 and the subsequent order against the Defendant, and any consequent orders thereafter were set aside with costs in the cause, as a consequence of which the Defendant was not required to enter appearance as provided for under Order 52 Rule 10 of the Civil Procedure Rules and the Originating Summons was to be placed before a Judge for hearing and determination.
7. On 03.05.2023 when counsel for the respective parties appeared before the court, attention was drawn to the fact that an agreement by way of a Deed of Settlement had been reached and executed by both



parties. The Plaintiff seeking its adoption as an order of this court. However, given the oral contentions raised by the Defendants regarding inter alia the scope and non-compliance with terms of the Deed of Settlement by the Plaintiff, the court directed the parties to file their respective affidavit material and submissions specific to the contested Deed of Settlement towards disposal on the suit herein.

8. In compliance, Valentine Ataka, counsel having conduct of the matter on behalf of the Plaintiff swore an affidavit dated 08.06.2023 stating that the Plaintiff had sometime in 2018 instructed the Defendant to represent it in various matters as listed First Schedule in the Deed of Settlement. That on account of the said instructions the Defendant was in possession of various litigation files listed in the Second Schedule and that parties continue with active litigation therein. He goes on to depose that in reaching an amicable settlement by way of the Deed, the parties herein had agreed to cease litigation by executing the Deed of Settlement, by which the Plaintiff agreed to pay the Defendant an all-inclusive sum of Kshs. 500,000/- in full and final settlement and in respect of which the Plaintiff's counsel was to issue a Professional Undertaking to secure the said payment.
9. He further deposes that in exchange of the Professional Undertaking, the Defendant was to consent to the marking of the matters in the Second Schedule of the Deed of Settlement as fully settled, with no order as to costs. Whereupon the Defendant would deliver all files and documents in respect of matters in the First Schedule. He asserts it was only upon fulfilment of the foregoing that the Plaintiff would pay the settlement sum under the Professional Undertaking. That despite execution the Deed of Settlement and issuance of the Professional Undertaking, the Defendant has refused, neglected and or otherwise delayed to effect the Deed of Settlement by refusing to record a consent in all the matters listed in the Second Schedule or handover the files as listed in the First Schedule.
10. Counsel avows that on account of the foregoing the Plaintiff was pressed to institute legal proceedings against the Defendant for breach of the Deed of Settlement in Nairobi Milimani MCCC E11231 of 2021 wherein vide a ruling delivered on 03.03.2021 the court entered summary judgment in favour of the Plaintiff. He concludes by deposing that it is in the interest of justice that the Deed of Settlement having already been filed be adopted as an order of the court.
11. In response, the Defendant filed a relying affidavit dated 21.07.2023 in which he dismisses the Plaintiff's depositions as made up of falsehoods, an abuse of the court process and drawn with a view to mislead the court to determine the matter without hearing both parties on the merits. He confirms that parties engaged in negotiations with an aim of settling various pending litigation matters whose subject mainly revolved around taxation proceedings and release of the Plaintiff's files.
12. He asserts that the foregoing global negotiations were intended to cover litigation between the parties herein in respect of the Plaintiff, Paragon Holdings Limited, Remax Realtors Limited, Techno Services Limited (hereafter companies) and all other matters related to the Plaintiff's then director Bulent Gulbahar. That it was agreed that all pending matters involving the Defendant and the foregoing companies be settled at a consolidated amount of Kshs. 750,000/- which would be paid as settlement fees for representing the companies. Further, he deposes that the negotiations were reduced into four (4) different Deeds of Settlement in respect of each company with the consolidated amount of Kshs. 750,000/- to paid in lump sum distributed as follows; - the Plaintiff Kshs. 500,000/-, Paragon Holdings Limited Kshs. 100,000/-, Remax Realtors Limited Kshs. 100,000/- and Techno Services Limited Kshs. 50,000/-.
13. That as a term of settlement the Plaintiff's advocate would issue a Professional Undertaking in the respective Deeds of Settlement and thereafter pay the consolidated amount in lumpsum and in exchange the Defendant had agreed to sign, record and adopt a consent in respect of the pending litigation to be marked as fully settled with no orders as to costs and hence deliver all complete files and



documents on the said matters to the Plaintiff. He confirms that following the execution of the Deeds of Settlement, the Plaintiff's advocate issued a Professional Undertaking relating to the Plaintiff to the effect that they would pay the settlement sum of Kshs. 500,000/- upon stated conditions.

14. That after receiving the Professional Undertaking and upon a court attendance on 18.03.2021 in respect of matter related to the parties herein, namely, Misc. App. No. E204 of 2019 Andrew & Steve Advocates v Paragon Electronics Limited, he noted that the Professional Undertaking regarding the other three (3) companies aforesaid had not been forwarded and he therefore objected to the settlement of the matters in piecemeal. The negotiations having been conducted, and agreement reached in a consolidated manner. He asserts that the foregoing position was communicated severally to the Plaintiff from the onset and the latter eventually yielded and forwarded all the Professional Undertakings with respect to the other three (3) Deeds of Settlement. That pursuant to the foregoing he sent his representatives to the Plaintiff's Advocate chambers on 09.04.2021 to hand over all the files the Defendant was handling on behalf of the Plaintiff in respect of the four (4) companies.
15. That however the handover was rejected by the Plaintiff's Advocate on grounds that the parties had failed to include matters relating to Remax Constructions Limited and that there was need to execute addendums to the Deeds of Settlements in respect of Paragon Holdings Limited and the latter company. He thus asserts, by the said conduct by the Plaintiff's advocate, it was evident that negotiations and settlement were to be enforced in a consolidated manner.
16. He states that the Plaintiff subsequently prepared the aforesaid Deeds of Settlement together with addendums and forwarded the same alongside consents in various matters for execution, which he executed in good faith in order that the Plaintiff would treat all matters in a consolidated manner and as such enforce the terms of settlement without prioritizing any other matter. He goes on to depose that despite the further Deeds of Settlement and addendums being prepared and approved by the Plaintiff, they have never returned the executed copies thereof frustrating the intended consolidated settlement and despite overtures to execute the foregoing the Plaintiff has failed, neglected, and refused to forward the same. That it therefore became clear that the Plaintiff had no intentions of abiding by the terms of the consolidated negotiations whereas the Plaintiff's act of executing consents in respect of various matters was fraudulently intended to avert execution or avoid paying already taxed costs.
17. He further asserts that the Plaintiff's actions were malicious and intended to defraud the Defendant while selectively continuing to prosecute some matters listed in the Second Schedule of the Deeds of Settlements and therefore, he instructed counsel to issue a Notice of Termination of all Deeds of Settlement as such the Deeds are no longer valid and the respective matters ought to proceed to their logical conclusion. That further, he is not aware of the proceedings in Nairobi Milimani MCCC E11231 of 2021 and in any event, decisions of subordinate court are not binding on superior courts. He concludes by deposing that the court ought not adopt the Deed of Settlement as an order of the court and that in any event the subject Deed of Settlement expressly states that the "Consent marking the matters in Scheduled 2 as fully settled as between the Parties" is the one to be adopted, and not the Deed of Settlement, and no such consent has been filed before this court.
18. Parties thereafter filed submissions in respect of the Deed of Settlement in issue. On the part of the Plaintiff, counsel restated the background of this matter and specifically reiterated that subsequent to the filing of the instant suit on 22.02.2021 parties signed a Deed of Settlement whose intent was to enable the release of the Plaintiff's files, subject to the issuance of a Professional Undertaking by the Plaintiff's new lawyers that the Defendant's agreed fees would be paid upon release of the files and settlement of all ongoing suits as between the parties.



19. It was submitted that in the Deed of Settlement it was inter alia agreed that Plaintiff would pay the Defendant an all-inclusive sum of Kshs 500,000/- as legal fees for all matters in which the Defendant had been acting for Plaintiff and that the said Kshs 500,000/- would be held by Plaintiff's new lawyers and would be released to Defendant upon it releasing the files in the instant matter and all other matters where the Defendant was previously acting for the Plaintiff, upon the recording of consents to settle all suits between the parties.
20. That the effect of the Deed of Settlement was that the Defendant was supposed to release all files to the Plaintiff and have this matter marked as settled against the Professional Undertaking issued on 15.03.2021, upon which the sum of Kshs 500,000 as agreed, would be released to the Defendant. Counsel contends that despite the Plaintiff's lawyers having issued the Defendant with an irrevocable Professional Undertaking the Defendant has refused to release the files and has also refused to have this matter marked as settled. That the Deed of Settlement which was drafted and voluntarily signed by Defendant amounts to an unequivocal admission and has the effect of fully resolving the dispute herein and upon the issuance of the Professional Undertaking, there is nothing more to litigate in this matter.
21. Counsel further took issue with the Defendant's contention that the Deed of Settlement cannot be enforced because other Deeds of Settlement which the Defendant believes relate to be affiliated with Paragon have not been signed. That the Defendant's argument that all the settlements were to be done in a "consolidated manner" is not supported in the executed Deed of Settlement and is tantamount to parole evidence having not been contained in the initial settlement deed drafted by the Defendant. Hence, any ambiguity or insufficiency should by reason of Contra Proferentem Rule be interpreted against them. The decisions in Paragon Electronics Limited v Fatma Muses [2022] eKLR, Twiga Chemicals Industries Ltd v Allan Stephen Reynolds [2014] eKLR and Mwangi Ngumo v Kenya Institute of Management [2012] eKLR were called to aid in the latter regard. In conclusion counsel argued that the court should reject the attempt by the Defendant to rewrite a contract they themselves drafted, and thus proceed to uphold the intents of the parties by marking this matter as settled with no orders as to costs as envisaged in the Deed of Settlement as read together with the Professional Undertaking.
22. On the part of the Defendant, counsel's submissions coalesced around the singular issue whether the undated Deed of Settlement ought to be adopted as an order of the court. Counsel reiterated the fact that negotiations were conducted in a consolidated manner covering the litigation matters between the Defendant's Firm and the Plaintiff herein, Paragon Holdings Limited, Remax Realtors Limited, Techno Services Limited and all other matters related to Bulent Gulbahar in his capacity aforesaid. That it was agreed all the pending litigation matters involving the companies be settled at a consolidated amount of Kshs. 750,000 which would be paid in lumpsum to the Defendant as settlement of fees for representing the companies. Further restating that the negotiations were reduced into four (4) different Deeds of Settlement, he cited other pertinent terms to include the Plaintiff's Advocates' issuance of a Professional Undertaking guaranteeing payment of the sums quoted in the Deeds, in exchange for the Defendant's signing, recording and adopting consents marking the active litigation matters as fully settled with no orders as to costs and the Defendant's delivery of all complete files and documents of matters the he previously handled on behalf of the Plaintiff
23. Counsel further asserted that in performance of the foregoing, parties herein began to enforce the terms thereof by inter alia executing consents to mark some of the disputes as settled however the Defendant noted that the Plaintiff was enforcing the terms of negotiations in piecemeal, contrary to the spirit of negotiation and expressly objected, insisting on the consolidated enforcement of the terms of settlement as negotiated on numerous occasions. That the Plaintiff eventually yielded and forwarded the Professional Undertakings regarding the all the companies, thus paving way for a



further enforcement of the terms of settlement. By this very conduct, the Plaintiff confirmed that the Defendant's position that negotiations were intended to be enforced in a consolidated manner, and as such, the Plaintiff is estopped from holding otherwise. The decision in *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR was called to aid in the latter regard.

24. Reiterating the rejection of handover of files on grounds of exclusion of matters related to Remax Construction Limited, Counsel asserted that notwithstanding execution of the agreements, addendums thereto and the same being forwarded to the Plaintiff, it has failed to return the executed copies to date, thereby frustrating and paralyzing the enforcement of the consolidated negotiations. While placing reliance on the decision in *M. Oriental Bank Limited & Another v Samuel Nyingi Matimu & Another* [2021] eKLR, he argued that the Defendant has of right declined to execute further consents and issued a notice of termination of the Deeds of Settlement due to the Plaintiff's want of clean hands. In summation, it was submitted that it is only fair and just that the Plaintiff's prayer that the Deed of Settlement be adopted as an order of the Court be declined.
25. The court has considered the pleadings by the respective parties as well as the submissions filed herein in respect of the issue earlier identified for consideration. The court has been called upon to determine the purport of an undated Deed of Settlement executed by the parties to the instant proceedings. The history of the matter and the gist of the issues the present dispute have in part been captured by the respective parties in their affidavit material and submissions.
26. This dispute arose from an advocate-client relationship. In due course, the parties executed a Deed of Settlement in an attempt to amicably put the instant suit and presumably other matters to rest. What this court gathers to be the gist of the Plaintiff's argument is that the undated Deed of Settlement was express and specific to the instant matter. On the part of the Defendant, it is their argument that negotiations in respect of the matters between the parties not only encompassed the instant matter but also other matters in respect of which, parties negotiated towards a global settlement.
27. It is not disputed that the instant suit was specific to Paragon Electronics Limited notwithstanding the equally admitted fact that the Defendant had acted for Paragon Holdings Limited, Remax Realtors Limited, Techno Services Limited as counsel, and that one Bulent Gulbahar was a director in all the stated companies in the material period. Further it is not in dispute that there was an attempt by the parties to amicably settle all pending litigation between them culminating with the Defendant surrendering all files it was handling on behalf of the Plaintiff. The bone of contention is the scope of the said negotiations and the purport of the undated Deed of Settlement which the parties brought to the attention of the court when they appeared before it on 03.05.2023,
28. In *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR the Court held that:

“... a court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”
29. The salient terms of the undated Deed of Settlement as executed and filed by the parties in this matter express that:

“It is now agreed as follows; -



1. In consideration of the mutual agreement and undertaking set out in this agreement the parties have granted the rights and accepted the obligations set out in the agreement.
2. That PEL has agreed to pay A&S an all inclusive sum of Kenya Shillings Five Hundred Thousand Only (Kshs.500,000) (hereinafter referred to as “Settlement Sum”) in full an final settlement of all claims that A&S may have against PEL.
3. The settlement sum shall be held by PEL’s lawyers AKO Advocates LLP (“AKO”) and released to A&S upon satisfaction of the following conditions (“Conditions Precedent”)
 - i. Signing, recording and adopting of a consent in court marking the matters in Schedule 2 as fully settled as between the parties thereto with no orders as to costs.
 - ii. A&S delivering all the complete files and documents in respect of the matters in Schedule 1 to AKO.
4. The condition precedent aforesaid shall be undertaken against an irrevocable professional undertaking issued by AKO to A&S stating that upon the satisfaction of the conditions precedent, AKO shall release the entire settlement sum to A&S within 7 days.
5. Upon receipt of the settlement sum A&S shall have no claim whatsoever against PEL and shall immediately release and hold PEL harmless and indemnified in respect of all the matter listed in Schedule 1 and matters incidental thereto.
6. At the earliest opportunity and not later than when any litigation matter as between the parties comes up in court and prior to the completion of this agreement, the parties agree to stay or otherwise hold those matters in abeyance pending the completion of this agreement.
7. That notwithstanding the request by the parties to court to stay the pending proceedings, should any ruling be delivered before the completion of the obligation of the parties herein, each party agree not to execute against the other and shall proceed to mark the matter as settled post ipso facto General Provisions
8. The parties acknowledge that this agreement shall be binding on their respective successors and assigns
 - a. The rights granted to the parties hereunder are personal to the respective party and they shall not be entitled to assign the benefits if this agreement or any of their rights hereunder except by prior written consent of the other party
 - b.



- c. This agreement shall not be varied or cancelled, unless such variation or cancellation shall be expressly agreed in writing by all parties.
- d.
- e. This agreement shall remain in full force until the completion and fulfilment by all parties of their obligation under this agreement.
- f. Any notice to be given under this agreement shall either be delivered electronically or telex or facsimile transmission. A notice shall be deemed to have been serve as once dispatched.
- g. The construction, validity and performance of this agreement shall be governed in all respects of Kenyan law...” (sic)

30. It appears from the material before the court that prior to the parties appearing before me on 03.05.2023, the Plaintiff in enforcing the Deed of Settlement had already obtained summary judgment against the Defendant in Nairobi Milimani MCCC E11231 of 2021 on 03.03.2021. The pleadings exhibited by the Plaintiff in that regard appear to have been filed in the Commercial & Tax Division of the High Court. The pleadings and proceedings in the Plaintiff’s suit before the subordinate court were not exhibited for the court’s perusal. Seemingly not to be outdone, and despite directions given by this court for the filing of affidavits and submissions on the contested Deed, the Defendant on 20.07.2023 proceeded issued a Notice of Termination of all Deeds of Settlements between himself and Paragon Electronics Limited, Paragon Holdings Limited, Remax Realtors Limited, and Techno Services Limited (See Annexure S-15). The Notice appears to have been sent via electronic mail to the Defendant on the same day in accordance with Clause 8(f) of the undated Deed of Settlement.

31. Given the contestation surrounding the undated Deed of Settlement and the above developments, the Court is wary of making any pronouncement as to the purport or application of the undated Deed of Settlement to the suit herein. This, to obviate embarrassing any trial that may eventually be held, or judgment passed by a different court on the same subject matter. Suffice to say that as matters stand now, it appears uncertain that this matter has been compromised in the manner asserted by either party. Consequently, the court declines to adopt the undated Deed of Settlement and will direct that this matter be held in abeyance until the full details of the summary judgment in Nairobi Milimani MCCC E11231 of 2021 as alleged by the Plaintiff become clear. For the avoidance of doubt, this does not in any way prevent the parties from engaging further with a view to a settlement acceptable to all.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Plaintiff: Ms. Ochieng h/b for Mr. Ataka

For the Defendant: Ms. Mwaniki

C/A: Carol

