



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL SUIT NO. 18 OF 2017

GALEXON KENYA LIMITED....PLAINTIFF/RESPONDENT

VERSUS

CENTRE FOR YOUTH LINKAGES AND EMPOWERMENT

PROGRAMS (CYLEP)..... 1ST DEFENDANT

COUNTY GOVERNMENT OF VIHIGA.... 2ND DEFENDANT

AND

COUNTY ATTORNEY OF VIHIGA.....APPLICANT

RULING

The application dated 7th December 2020 was filed by the **COUNTY ATTORNEY OF VIHIGA**.

1. He first sought to be enjoined to this suit and also to **JUDICIAL REVIEW CAUSE NO. 10 OF 2019**.
2. Secondly, he sought a stay of execution of the Decree arising from the Ruling which was delivered on 18th March 2019, and all other orders and directions in execution thereof issued in **JUDICIAL REVIEW CAUSE NO. 10 OF 2019**.
3. The Supporting Affidavit was sworn by **ANDREW AMADI**, the Principal Legal Counsel in the Office of the County Attorney, Vihiga County.
4. Mr. Amadi deponed that the Court's Ruling was based on a **DEED OF SETTLEMENT** dated 10th December 2018.
5. He pointed out that the said Deed of Settlement was signed by **MUKHUNJI MAKATIANI**, who was the Plaintiff's authorized officer. The signature of Mr. Makatiani was attested by **KANIARU KIMANDU ADVOCATES**.
6. The Applicant has taken issue with the fact that the attestation was done by the Plaintiff's advocate.
7. It was the Applicant's position that the said attestation was a violation of the law.
8. The Applicant has described the cases in which Mr. Kaniaru Advocate is representing the Plaintiff herein, as being highly contentious.
9. I find the said statement to be surprising, considering that the issues, if any, which arose from the pleadings, were resolved by the parties themselves. It is the parties who executed the Deed of Settlement.
10. I cannot understand how a matter which the parties resolved through a Deed of Settlement can be deemed as highly contentious.
11. The Applicant acknowledged in his submissions that;

“It is evident from the court record that there was no defence filed on the record on behalf of the 2nd defendant. What is

there is a purported deed of settlement signed by some two officers on behalf of the County Government, which the honourable Court was later invited, under ex parte proceedings to execute, giving rise to the judgement.”

12. Between the parties who were in the suit at the material time, there were no disputes. There was nothing highly contentious: that is why they executed the deed of settlement.
13. It is the Applicant, who is being enjoined to the suit, almost 2 years after the Judgment was entered in terms of the deed of settlement, who is raising issues
14. In my considered view, at the time when Advocate Kaniaru was attesting the signature of his client, on the deed of settlement, there was no reason that could have caused him to believe that any disputes would arise 2 years later, about the deed of settlement.
15. The Applicant has made reference to confessions about the illegality of the implementation of the stalls in contest, as the same was in total violation of the procurement laws.
16. The issue of the alleged illegality may arise if the relevant organs institute appropriate legal action against the persons perceived to be culpable.
17. At the moment, the Applicant has not demonstrated to this Court that it has instituted a *“legitimate claim against the 2nd defendant.”*
18. Therefore, it is unknown if at all, Advocate Kaniaru will be required to be an automatic witness in any case, at which the 2nd Defendant would be on trial.
19. Interestingly, the 2nd Defendant is the County Government of Vihiga County.
20. As the Applicant has pointed out, the provisions of **Section 7 of the County Attorney Act No. 14 of 2020** confers upon him the role of the principal legal advisor to the County Government. In the said capacity, the County Attorney;

“(c) shall, on the instructions of the county government, represent the county executive in court or any other legal proceedings to which the county executive is a party, other than criminal proceedings.”

21. I therefore find it odd that the Applicant is alluding to a legitimate claim against the county government: Might that explain why the Applicant sought to be enjoined to these proceedings, instead of taking instructions from the county government?
22. There is absolutely no doubt that a court of law ought not to be an avenue for the enforcement of an illegal contract.
23. However, there has been no determination by any court of competent jurisdiction about the alleged illegality of the contract in issue herein. That is not to say that it is only when a contract has been adjudged to be illegal by a court of law that it is rendered illegal.
24. I am also alive to the fact that *Ex turpi causa non oritur actio*; which was expounded upon by the Court of Appeal in **KENYA AIRWAYS LIMITED V SATWANT SINGH FLORA [2013] eKLR**, as follows;

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”

25. In the case before this Court, the Defendants did not plead illegality.
26. Secondly, the case did not proceed to trial, where the parties would have adduced evidence.
27. The issue of liability was settled through the deed of settlement.
28. Following the determination of the issue of liability, there is nothing about which any of the parties can lead evidence, as this is not a case in which the Court was being called upon to assess the compensation, after determining liability.
29. In the event, the Applicant was becoming enjoined to the suit when it had been determined. I find that he cannot be permitted to re-open a case to which he had not been a party, and which the parties had resolved.
30. In my considered opinion the Applicant has come onto the scene too late.
31. In the circumstances, I venture to suggest that the route taken by the Applicant was wrong. I hold the considered view that if the contract between the Plaintiff and the 2 Defendants was tainted with illegality, then appropriate action must be taken against those involved in perpetuating the said illegality.

32. I am aware that the **Ethics and Anti-Corruption Commission** sought and obtained an interim order to freeze the Bank Account into which the proceeds from the transaction was to be credited by the County Government of Vihiga. The basis for obtaining the said order was the very same one as cited herein.

33. To my mind, the action taken by the **Ethics and Anti-Corruption Commission** is perhaps one of the lawful routes that can be utilized by the appropriate institutions to not only safeguard public assets but to also bring to book those who were culpable.

34. Finally, the Applicant has acknowledged that;

“Section 80 of the Civil Procedure Act and Order 45 Rules 1, 2, 3 and 4 of the Civil Procedure Rules accords a party who has not appealed a decision which is appealable to seek redress through a review if he satisfies the court, amongst other grounds, that there is sufficient reason favouring a review. The foregoing explanation provides sufficient ground to grant the orders sought in the application, and we pray the application be allowed as prayed.”

35. In this case, as I have already pointed out, the Applicant was not a party in the proceedings at the time when Judgment was granted. Therefore, he had no locus to lodge an appeal from the said Judgment.

36. In any event, the Judgment constituted the adoption of a deed of settlement which the parties had crafted. Therefore, I find that none of them may have had a basis for lodging an appeal, considering that they settled the matter.

37. Although the **Ethics and Anti-Corruption Commission** had obtained the interim orders which froze the bank account, it did not, to my knowledge, take any further steps against the persons deemed to have conspired to obtain money from the County Government.

38. I reiterate that appropriate action needs to be taken against all persons deemed culpable. But just like the Court cannot allow itself to be used to enforce illegal contracts, I find that the Applicant cannot use the Court to obtain orders which, if any, should be sought by the appropriate “*persons*”, at the appropriate forum, through the proper route.

39. In the result, the application dated 7th December 2020 is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2021

FRED A. OCHIENG

JUDGE