REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

HCCC NO. 119 OF 2014

(CONSOLIDATING COMMERCIAL CASE NO. 3 OF 2019

(FORMER ELC NO. 236.2014

AND COMMERCIAL CASE NO. 168 OF 2014)

TROPICAL FOODS INTERNATIONAL LTD..... 1st PLAINTIFF

JAMES KIMONYE .....2nd PLAINTIFF

MARY KIMONYE..... 3rd PLAINTIFF

FRANCIS MUHIA MUTUNGU ..... 4th PLAINTIFF

VERSUS

EASTERN AND SOUTHERN AFRICAN TRADE AND

DEVELOPMENT BANK (PTA BANK) ..... 1st DEFENDANT

CORFU INVESTMENTS LIMITED..... 2nd DEFENDANT

RULING

1. The words "without prejudice" are an invaluable protection that facilitates negotiations between parties. This Court is asked by Corfu Investments Limited (Corfu or the 2nd Defendant) to lift that umbrella and to find that a compromise has been reached between it and the Plaintiffs (perhaps the 1st and 2nd Plaintiff who are together called the two Plaintiffs). The task of this Court is to decide whether the circumstances here fall in the exceptional category when the umbrella can be taken away.

2. Corfu presents a Notice of Motion dated 15th September 2017 for the Court to consider grant of the following orders:-

> *1. Judgment be and is hereby entered in favour of the 2nd Defendant in terms of the compromise reached between the Plaintiffs and the 2nd Defendant as follows:-*
>
> *a) Judgment be and is hereby entered in favour of the 2nd Defendant for the sum of Kshs.20 Million.*
>
> *b) The sum of Kshs.20 Million be paid in 18 equal instalments of not less than Kshs.1,111,111 with the first instalment falling due on 28th February 2017 (now past) and thereafter on the last day of each succeeding month until payment in full.*
>
> *c) The 2nd Plaintiff agrees to clear all the arrears within 30 days from the date of filing the consent and is also at liberty to obtain a loan to clear the entire sum of Kshs.20 Million*

d) The costs incurred by the 2nd Defendant in respect of the present suit and Civil Case No. 168 of 2014 Mary Wanjira Kimonye v Eastern & Southern African Trade & Development Bank & Another and ELC Civil Case No. 236 of 2017 Francis Muhia Mutungu v Eastern and Southern African Trade and Development Bank & Another be agreed as between the plaintiffs and the 2nd Defendant within 30 days from adopting the consent, failing which the same be taxed.

e) Upon payment of the sum Kshs.20 Million the 2nd Defendant shall discharge the following properties:-

i. Title Number Abothuguchi/Katheri/1959 registered in the name of 2nd Plaintiff – James Kimonye.

ii. Title Number Komothai/Igi/652 registered in the name of Francis Muhia Mutugu PROVIDED that as pertains this property if the 2nd Plaintiff pays 50% of the decretal amount the property shall be discharged with each party bearing its own costs pertaining to the discharge.

f) In the event of default of payment of any instalments on its due date, the entire decretal amount together with interest at Court rates shall fall due and payable by the 2nd Defendant together with costs and the 2nd Defendant shall be at liberty to sale the charged property Abothuguchi/Katheri/1959 by public auction after the expiry of 30 days from the date of default.

3. James Kimonye (the 2nd Plaintiff or Kimonye) is a Director of Tropical Foods and the registered owner of Abothuguchi/Katheri/1959 (the Abothuguchi property). On the strength of various securities which included a charge over that property, a facility of US Dollars 250,000 was granted to Tropical Foods by PTA Bank. A dispute has arisen between the parties and amongst the issues in contention is whether a transfer of charge over the Abothuguchi property is valid.

4. Mary Wanjira Kimonye is spouse to Kimonye. She too questions the validity of the transfer of charge and commenced Civil Suit No. 168 of 2014 (Mary Wanjira Kimonye –vs- Eastern and Southern African Trade and Development Bank & 2 Others). That suit was consolidated with the present proceedings.

5. Also consolidated to this matter is Civil Suit No. 3 of 2019 (Francis Muhia Mutungu –vs- Eastern and Southern African Trade and Development Bank & Another).

6. The details of the disputes are unnecessary for now, but a short background of the events leading to the current application is as follows.

7. A meeting towards resolving this matter was held on 13th December 2016 in the offices of the advocates for Corfu. In attendance were John Gituma on behalf of Corfu, Kimonye, counsel Allen Gichuhi (for Corfu) and counsel Kennedy Nyaencha (for Tropical Foods and Kimonye). Following that meeting, on 9th January 2017, counsel for Tropical Foods and Kimonye wrote the following letter to counsel for Corfu:-

9th January 2017

Wamae Allen Advocates,

NAIROBI. *Without prejudice*

Dear Sirs

RE: HCCC NO. 119 OF 2014

TROPICAL FOODS INTERNATIONAL LTD & JAMES KIMONYE –VS- EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK & CORFU INVESTMENT LIMITED

We refer to the meeting in our offices on the 13th day of December 2016 attended by:

o *Mr. John Gituma*

o *Mr. Allen Gichuhi (counsel)*

o *Mr. James Kimonye*

o *Mr. Kennedy Nyaencha (counsel)*

It was agreed to settle the matter out of Court and all matters related save for the arbitration process between PTA and Tropical Food Limited by Mr. Kimonye paying to Mr. Gituma and/or to Corfu Limited Kshs.20,000,000.00 in full and final settlement to enable the discharge/release of Mr. Kimonye's property herein.

The said will be paid within 18 months at the rate of approximately 1.1 Million per month commencing end of February 2017 and thereafter end of each succeeding month till completion.

Kindly confirm this to be the correct position to enable us prepare the correct and detailed settlement order.

Yours faithfully

NYAENCHA, WAICHARI & CO. ADVOCATES

KENNEDY NYAENCHA

Cc: Client

8. Nine days later, on 18th January 2017, counsel for Corfu responds:-

Nyaencha, Waichari & Company Advocates,

Nairobi.

"Advance copy via Email"

"Hardcopy via Courier Service Delivery"

"WITHOUT PREJUDICE"

Dear Sirs,

RE: HCCC NO. 119 OF 2014

TROPICAL FOODS INTERNATIONAL LTD & JAMES KIMONYE –VS- EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK & CORFU INVESTMENT LIMITED

We refer to your letter of 9th January 2017. At the meeting we had also agreed on the following points:

1. The interest and costs would also be recovered from the damages that may be recovered in the arbitration against the bank.

2. The properties will be discharged once the costs and interest are settled. Your client was also at liberty to seek a financier to take over the debt. If he does so then the costs and interest will be paid and all the properties discharged and the matter marked as settled.

Please also confirm that you have also contacted the other advocates so that we can have a joint consent executed by all settling the three cases.

Please send us a draft consent for our consideration.

Yours faithfully,

WAMAE & ALLEN ADVOCATES

ALLEN WAIYAKI GICHUHI

CC: Client

9. There was no response from counsel or the two Plaintiffs and this was considerable silence and so on 27th March 2017, counsel for Corfu writes again. The terms of the draft consent that accompanied the letter are those that this Court is asked to find is a compromise judgment (See Paragraph 2 of this Ruling)

10. Counsel for the two Plaintiffs was not about to execute the consent and another reminder is sent out by counsel for Corfu on 20th June 2017. This time counsel notifies his counterpart that if they would not have executed the consent on or before 23rd June 2017 then they would proceed to file an application to compromise the suit. Hence the current application.

11. The Plaintiffs oppose the application and raised the following grounds:-

i. That the remedy sought cannot be granted in the face of pleadings in Court as there was no counterclaim by the Defendants.

ii. The application purports to involve properties that were wrongly charged and their discharge cannot be part of a Court order.

iii. The purported consent compromising the suit is not signed by any party to the proceedings.

12. As for Francis Muhia Mutungu,he takes the position that once there is a settlement between Corfu and the 2nd Plaintiff, then there is no basis for Corfu to continue holding his title. He prays for an order directing Corfu to discharge and release the title for the property forthwith and for the suit between him and the Defendants to be marked as settled with no orders as to costs.

13. The meeting of 13th December 2016 was followed by an exchange of on "without prejudice" letters by the counsel for the parties. Two arguments are made by the Applicant.

14. That the terms of the compromise reached on 13th December 2016 were set out by the Plaintiffs advocates in their letter dated 9th January 2017. That subsequently, by correspondence dated 20th June 2017, the terms were accepted without modification by it. In support of the proposition, the Applicant contends that payment of some Kshs.800,000/= made by Kimonye in two tranches on 15th May 2018 and 1st August 2018 are in partial fulfilment of the settlement.

15. A further argument, and it would be an alternative argument, is that by failing to respond to its letters of 27th March 2017 and 20th June 2017, it has to be taken that the Plaintiffs accepted the draft terms of the compromise. Simply, that silence means acquiescence and acceptance by conduct.

16. For the two Plaintiffs, they took the view that Corfu's acceptance was conditional and that the agreement was predicated upon entering a consent which did not happen.

17. The Plaintiffs also argue that the alleged compromise requires money to be paid to Corfu as though there was a counterclaim by it. In addition, the Court was asked to find that the consent could not compromise the matter because not all parties to the consolidated suit were involved.

18. The Applicant seeks to persuade the Court to read a compromise in the correspondence exchanged between parties on "without prejudice" correspondence. "Without prejudice" aids negotiations because parties can freely state their positions without the fear that they will be bound by those positions in the event the negotiations do not yield an agreement or contract. It is therefore a useful tool in closing gaps between competing positions taken by parties as they can engage in unrestrained and free negotiations. There is therefore a public interest in protecting the tool of "without prejudice".

19. The old statement of Lindley, L. J. in Walker v. Wilsher (1889) 23 Q.B.D. 335 has been held to be authoritative on when the umbrella of "without prejudice" can be lifted. As quoted by Tomlin -vs- Standard Telephones & Cables Ltd [1969] 1 WLR 1378 his Lordship stated:-

> "What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

20. Counsel for the Applicant asked this Court to find, on a parallel of Tomlin (*supra*), that a compromise has been reached in this matter. The facts in that case briefly stated is that a claim arose out of an industrial accident and a solicitor representing the claimant and the insurers of the employee entered into out of Court negotiations towards settling the claim. As is common in those types of claims, the negotiations would be on the twin issues of liability and quantum. Again not uncommon is that in the course of negotiations an agreement may be reached on one and not the other. In this matter, by majority of two to three, the Court held that looking at the without prejudice correspondence, a definite and binding agreement on liability had been reached. The decision did not intend, and did not, change the old position. It is nevertheless a proposition that where negotiations involve various distinct facets, a definitive and binding agreement can be read in any of the distinct facets without holding that there is an all-encompassing agreement.

21. I have looked at the two all-important letters that the Applicant asserts give birth to a compromise. These are reproduced elsewhere in this decision. In the letter of 9th January 2017 by counsel for Kimonye, he states that the settlement meeting agreed that Kimonye would pay Gituma and/or Corfu Kshs.20,000,000/= in full and final settlement to enable the discharge of Kimonye's property. And the settlement would be made within 18 months at the rate of approximately Kshs. 1.1 Million per month commencing end of February 2017 and thereafter at end of each succeeding month till completion.

22. In response Corfu's lawyers state that the meeting had also agreed that the interest and costs would be recovered from damages that may be recovered in the arbitration against the Bank and that the properties will be discharged once the costs and interest were settled. Further, and I shall return to, is that counsel alluded to the need for a joint consent to settle all the three cases.

23. This Court accepts the submissions by counsel for the two Plaintiffs that the Applicant's counsels' letter of 18th January 2017 was a conditional acceptance. The parties were at odds as to the exact breadth of the agreement. I would take it that the discharge of Kimonye's property was at heart of the matter. Indeed his suit against the Defendant is substantially about just that.

24. Reading the two letters, there was no consensus as to when discharge was to happen. Kimonye stating that payment of Kshs.20,000,000/= would be made in full and final settlement to enable the discharge of his property. While Corfu holding that, in addition, to payment of Kshs.20,000,000, the discharge would happen once costs and interest were settled. No consensus can be read into these two positions and no complete contract was established by these two letters.

25. That aside, the Applicant's counsel asks this Court to find that an agreement had been reached because of two subsequent events.

26. On 27th March 2017, counsel for the Applicant prepares a draft consent and sends it for approval and acceptance by counsel for the two Plaintiffs. In fact, they ask that the approval and acceptance be made within 3 days of the date of the letter. No such approval and acceptance was forthcoming. Of significance, at least from the Applicant's point of view, is that counsel for the two Plaintiffs have not responded to that letter at all. They have been completely silent. The Court is therefore asked to construe the silence as acceptance.

27. The Applicant relies on the old American decision in Cole-McIntyre-Norfleet Co. -vs- Holloway - 141 Tenn. 679, 214 S.W. 817 (1919). The Court has read that decision and takes a view that the *ratio decidendi* is to be found in the following passage:-

> "It is undoubtedly true that an offer to buy or sell is not binding until its acceptance is communicated to the other party. The acceptance, however, of such an offer, may be communicated by the other party either by a formal acceptance, or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself. When the subject of a contract, either in its nature or by virtue of conditions of the market, will become unmarketable by delay, delay in notifying the other party of his decision will amount to an acceptance by the offerer. Otherwise, the offerer could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while he reserves time to himself to see if the contract will be profitable."

28. The decision proposes that silence to an offer can be construed as acceptance where a duty to speak arises and the delay in communicating the acceptance prejudices the offeror who would have relied, to its detriment, that the acceptance will come anyway. Like in that case where the goods offered would go bad after sometime and therefore become unmarketable. This was emphasized by the same Court's observation in declining the petition to rehear, it stated:-

> "This is only where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence. There must be the right and the duty to speak, before the failure to do so can prevent a person from afterwards setting up the truth. We think it is the duty of a wholesale merchant, who sends out his drummers to solicit orders for perishable articles, and articles consumable in the use, to notify his customers within a reasonable time that the orders are not accepted; and if he fails to do so, and the proof shows that he had ample opportunity, silence for an unreasonable length of time will amount to an acceptance, if the offerer is relying upon him for the goods."

29. I do not think that the Applicant has brought its circumstance within this proposition of the law for two reasons. First, it has not been established that the two Plaintiffs were under a duty to communicate their acceptance or rejection of the offer within a set timeline. Even though the Applicant imposed a three day timeline, the two Plaintiffs did not hold themselves out as accepting the timeline. Second, the Applicant has not established that the two Plaintiffs made representations that their silence should be construed as acceptance and because of that representation, the Applicant made adjustments to its affairs to its detriment or prejudice.

30. There is then the further argument that two payments of Kshs.400,000/= each made by Kimonye on 15th May 2018 and 1st August 2018 respectively is in partial fulfilment of the settlement and evidence of acceptance by conduct. This Court takes a view that acceptance by conduct could only be manifested if the conduct of the two Plaintiffs was aligned to full compliance of the said purported compromise. The alleged compromise required the Plaintiffs to pay the sum of Kshs.20,000,000/= in 18 equal monthly instalments of not less than Kshs.1,111,111/= each with effect from 28th February 2017. By the time Kimonye paid Kshs.400,000/= on 15th May 2018 more than 13 months had lapsed. If indeed Kimonye was fulfilling the terms of the compromise, then he should have paid at least 14,444,443 by this time.

31. While payment of the two instalments is evidence of admission of a debt, it cannot be construed as acceptance of the entire settlement as seen from the perspective of the Applicant.

32. One other matter sways this Court away from reaching a decision that there is a compromise. The settlement meeting did not involve the other parties to the consolidated suit. And the Applicant itself does not doubt the importance of their participation and that would be the reason why its counsel, in the letter of 18th January 2017, asks the counsel for the two Plaintiffs to confirm that they had contacted the other advocates so that they can have a joint consent executed by all, settling the three cases which had been consolidated.

33. And the divergence in view as between Mutungu and Corfu as to what the compromise means is clear manifestation that there is no meeting of minds. Mutungu's ultimate position on this is captured in paragraph 16 and 17 of his affidavit when he depones:-

> "16. THAT in view of the foregoing there is no basis for the 2nd Defendant to continue holding my title for the suit property.
>
> 17. THAT I therefore pray that an order do issue directing the 2nd Defendant to discharge and release the title for the suit property forthwith and for the suit between me and the 1st and 2nd Defendants be marked as settled with no orders as to costs."

34. Mutungu's position is that his property should be discharged at once. Corfu's position is that not just yet. That the property can only be discharged upon payment of the facility by Kimonye and this is captured on limb e (ii) of the said "compromise". These divergent positions demonstrates that there was no consensus among all parties in the consolidated suit.

35. As would be clear now, the Court does not find that the circumstances in this case reveal a compromise. The Notice of Motion of 15th September 2017 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 30th Day of July, 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

No appearance for the Plaintiffs.

Rabut for the 1st Defendant.

Gichuhi for the 2nd Defendant.