



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 119 OF 2014**

**TROPICAL FOODS INTERNATIONAL LTD.....1<sup>ST</sup> PLAINTIFF**

**JAMES KIMONYE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE EASTERN AND SOUTHERN**

**DEVELOPMENT BANK (PTA) BANK.....1<sup>ST</sup> DEFENDANT**

**CORFU INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Court is asked to consider and determine a Motion of 15<sup>th</sup> September 2017 which seeks that Judgement be entered in favor of the 2<sup>nd</sup> Defendant in terms of a compromise allegedly reached between the Plaintiffs and the 2<sup>nd</sup> Defendant.

2. The terms of the Compromise are set out on the face of the Motion and also touch on Civil Case No.168 of 2014 - Mary Wanjira Kimonge vs. Eastern and Southern Africa Trade and Civil Case No. 168 of 2018 - Development Bank & Another and ELC Civil Case No. 236 of 2014 - Francis Mutugu Nutungu vs. Eastern and Southern Africa Trade and Development & Another, in clause (d) which reads:-

“(d) The Costs incurred by the 2<sup>nd</sup> Defendant in respect of the present Suit and Civil Case Nol 168 of 2014 Mary Wanjira Kimonya v Eastern & Southern African Trade & Development Bank & Another and ELC Civil Case No. 236 of 2014 Francis Muhia Mutungu v Eastern and Southern African Trade and Development Bank & Another be agreed as between the Plaintiffs and the 2<sup>nd</sup> Defendant within 30 days from adopting the Consent, failing which the same be taxed”.

3. Also in respect to ELC Case No. 236 of 2014 part (ii) of Clause (e) but it is clearer when clause (e) is set out in its entirety:-

“e. Upon payment of the sum of Khs.20 million the 2<sup>nd</sup> Defendant shall discharge the following properties:

(i) Title Number Abothuguchi/Katheri/1959 registered in the name of the 2<sup>nd</sup> 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 2<sup>nd</sup> Plaintiff pays 50% of the decretal amount the property shall be discharged with each party bearing its own costs pertaining to the discharge”.

4. Now through a Replying Affidavit of Francis Muhia Mutungu sworn on 24<sup>th</sup> October 2017, this Court’s attention was drawn to the Order of Gikonyo J. made on 3<sup>rd</sup> March 2015. The Order reads:-

“As all parties are agreed, I order that cases No.168/2014, 119/2014 and ELC No.236/2014 are all consolidated for hearing and determination by this Court. Consequently ELC No.236/2014 shall be accordingly transmitted to this file for hearing and disposal. The Deputy Registrar shall formally request for file No. 236/2014 from ELC for purposes of the Order. It is so ordered. Mention on

24<sup>th</sup> March 2015”.

This Court is not aware of any subsequent Order setting aside or varying that Order.

5. Now, the firm representing the Plaintiff in Civil Case No. 168 of 2014 is Muciimi Mbaka & Co. Advocates and in so far as the terms of the Consent touch on the matters that arise in that suit (including costs) then that firm ought to have been served with the Motion before Court. As drawn, the Motion does not seem to have been intended for service on that firm. This Court needs to be satisfied that the firm has been served.

6. In respect to the Plaintiff in ELC No. 236 of 2014, he is not entirely opposed to the compromise but sets out some conditions. That his concession is conditionally. How does the Applicant react? It submits that,

*“In respect of the Plaintiff in ELC 236 of 2014, the issues intended to be raised in respect to Prayer 1(e) of the Application, are live in the aforementioned Suit where they would best be addressed”.*

The submission seems to ignore or be unaware of the Order of consolidation!

7. For the reasons above this Court is unable to determine the Motion as of now and direct as follows:-

a) The Motion be served on Counsel for the Plaintiff in HCC NO. 168 of 2014.

b) The Parties herein make their representation on the position taken by the Plaintiff in ELC No. 236 of 2014.

**Dated, delivered and signed in open Court at Nairobi this 19<sup>th</sup> day of October 2018.**

**F. TUIYOTT**

**JUDGE**

Present:-

Odhiambo h/b Kamau for 2<sup>nd</sup> Plaintiff

Chebet for Gichuhi for 2<sup>nd</sup> Defendant

Nixon-Court Assistant