



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 263 OF 2009**

**JONATHAN MALINDA ..... PLAINTIFF**

**VERSUS**

**LOTA MOTORS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WENDY JANET HETNIER ..... 2<sup>ND</sup> DEFENDANT**

**ANTI-PEST (K) LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this court is the defendants’ Notice of Motion dated 3<sup>rd</sup> February, 2017, seeking the following orders:

*i. That this suit be marked as wholly adjusted and compromised by a lawful agreement made between the parties to settle this matter in the sum of KShs. 3,500,000/- (subject to contribution on liability) and costs.*

*ii. The agreement be recorded and judgment entered in favour of the plaintiff in the sum of KShs. 3,500,000/- subject to 20% contribution and costs of the suit.*

2. The motion is supported by the grounds on the body of the motion and the supporting affidavit of Gibson Maina Kamau who is the Deputy Manager, Legal Affairs of the Heritage Insurance Company Kenya Limited, being the defendants’ insurer. It is contended that as a result of a series of correspondence between the plaintiff’s and defendants’ advocates, negotiations were done and a binding agreement was reached to the effect that the defendants would pay a sum of KShs.3.5 Million to the plaintiff which sum was to be subjected to a 20% contribution on the part of the plaintiff. It was deponed that the said agreement was entered into without fraud, collusion or undue influence.

3. In response thereto, the plaintiff swore a replying affidavit on 8<sup>th</sup> February, 2017. He averred that the negotiations were on a “without prejudice” basis and were thereby privileged communication that could not be admissible as evidence. He admitted that a consent was recorded on liability but thereafter on 28<sup>th</sup> November, 2016 parties recorded a consent on the following terms:

*i. The parties do file written submissions for the court to determine the quantum of damages.*

*ii. The plaintiff to attach claim documents to his submissions.*

4. I have considered the submissions of the parties herein which were ideally a reiteration of the

affidavits. What falls for this courts determination is whether there was a binding agreement between the parties which comprised the suit. I have taken the liberty to peruse the court record, it is reveals that the court adopted the consent letter dated 9<sup>th</sup> February, 2016 whose contents only addressed the issue of liability which was agreed on, at the ratio of 80:20 between the defendants and the plaintiff. The defendants have annexed to this application the letter dated 22<sup>nd</sup> July, 2016, which is written to the defendants' advocates by the plaintiff's advocates. The said letter indicate that the plaintiff was agreeable to taking a global sum of KShs. 3.5 Million. The said letter is written on a "*without prejudice*" basis.

5. That offer was accepted by the defendants vide a ltter dated 24<sup>th</sup> January, 2017 but on 10<sup>th</sup> February, 2016 when the matter was in court for assessment of damages, parties agreed to finalise the same by way of written submissions. On the said date, the defendants were represented by Mr Makori and the issue of out of court negotiations on quantum did not arise. As at that time, no settlement on quantum had been received and the defendants had not accepted the offer by the plaintiff. Following the consent order by the parties to file submissions, the plaintiff went ahead and filed his on 8<sup>th</sup> December, 2016 but instead of filing their submissions, the defendants filed the present application.

6. Though the defendants have argued that time was not of essence, my considered view is that when the parties agreed to file written submissions for the court to assess the quantum of damages, that technically brought the negotiations to an end and any compromise of the suit had to be reached by consent of both parties. I am persuaded by the submissions made on behalf of the plaintiff that the defendants most likely accepted the plaintiff's offer after they had been served with the submissions after they saw the figures on quantum as submitted.

7. I have perused the authorities relied on by the defendants in support of the application herein which dwells more on when letters exchanged during negotiations and marked "*without prejudice*" can be admitted in evidence. This application deals with a completely different scenario as parties had agreed to let the court assess quantum of damages.

8. Having said that, I find and I hold that the application dated 3<sup>rd</sup> February, 2017 has no merits and the same is dismissed with costs to the plaintiff.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of April, 2017.**

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**L NJUGUNA**

**JUDGE**