



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 110 OF 2014**

**ALI HASSAN ALI.....PLAINTIFF**

**VERSUS**

**1. DIAMOND TRUST BANK KENYA LIMITED**

**2. J.M.GIKONYO TA GARAM INVESTMENTS.....DEFENDANTS**

**RULING**

1. By an application dated the 11.12.2015 and filed on 15.12.2015 expressed to be anchored on the provisions of order 25 Rule 5 as well as section 1A, 1B & 3A of the Civil Procedure Act, the plaintiff seeks from the court orders that:-
  - a. **That this suit be marked as settled and or compromised.**
  - b. **That the sum of Ksh.500,000/= be released to M/s Khatib & Company Advocates.**
  - c. **That the costs of the application be provided for.**
2. The application is grounded on the facts that subsequent to this suit being filed the plaintiff engaged the 1st defendant directly, agreed on the sum outstanding, paid the agreed sum in consideration of which the 1st defendant did execute a reconveyance of the security offered to it by the plaintiff hence there remains no dispute between the parties deserving being litigated upon.
3. It is further contended by the plaintiff that upon getting back his documents of title he did, through his advocates, inform the defendants advocate of the developments and requested them to confirm settlement but the said advocates have failed to confirm for it continued stay in court serves no purpose.
4. On the basis of the said compromise, the plaintiff pays that the sum of kshs.500,000 deposited in court as security when the injunction was granted to him be released to him.
5. Exhibited in the affidavit sworn and filed by the plaintiff in support of the application and contention that there has been a compromise or settlement is a deed of reconveyance over title No. SUBDIVISION NO.6239 (original number 6291/3) section 1. MAINLAND NORTH MOMBASA county and drawn by M/S A.A. SAID & CO. ADVOCATES; that reconveyance was duly executed on behalf of the bank and Registered on 10.12.2014.
6. Equally exhibited is a calculation sheet of the plaintiffs indebtedness and a series of letter notifying the 1st defendants advocate of the compromise and seeking the release of the security deposited in court.
7. In opposition to the application the 1st defendant never filed any replying affidavit but the 2nd

defendant filed grounds of opposition and a replying affidavit in which it is contented that the application is misconceived for having been filed by a firm of advocates not on record for the plaintiff and further that the same is *res judicata* as a similar application had been filed, considered and dismissed by Judge Kasango on 3.3.2015.

8. The 2nd defendant's said replying affidavit adds that he did duly receive instructions from the 1st defendant to advertise the security for sale by public auction; that he did carry out his mandate and was only forestalled by the court order of injunction; that the compromise to which he is aware was done without involving him and that he intends to recover his costs from the security deposited in court for which reason the security should not be released.

### **Analysis and Determination:**

9. Having read the papers filed and listened to the advocates on the application, there are only two issues that I must consider and determine to dispose of the application. The issues are whether the dispute between the parties has been compromised or settled and whether or not on the facts presented to court the security deposited in court should be released.
10. There are also presented for determination by the defendant the technical questions whether the firm of KHATIB & CO. ADVOCATES are on record for the plaintiff and whether or not the application is bad for being *res judicata*. I will address the technical objections prior to the substantive issues.

### **Technical issues:**

11. It is evident that by the court ruling dated 5.3.2015 the court granted to the firm of KHATIB & CO. ADVOCATES leave to cease acting for the plaintiff and declined an application for the release of the security deposited in court.
12. This court proceeds from the dictates of the constitution against technicalities and strives to look at the substantial justice of the case. As can be seen the following facts are NOT in dispute:-
  - i. After filing the application to cease acting there was a filed notice of appointment of Advocate.
  - ii. The substratum of the suit was to injunct the sale of the plaintiff's security offered to the 1st defendant. If not for that lending agreement between the 1st defendant and the plaintiff and the subsequent instruction from the 1st defendant to the 2nd defendant there would not have been a dispute between the plaintiff and the second defendant. I find and hold that interests of the 2nd defendant in the suit was dependent upon and ancillary to the interests of the 1st defendant. In that context, once the foundation of the suit, being the question exercise of statutory power of the sale, was compromised between the principle parties, it is difficult to discern what other dispute remain to be determined or litigated upon. The fact that there is a filed notice of appointment after the application to cease acting was filed and argued persuade me to find that the firm of KHATIB & CO. ADVOCATES are indeed on record for the plaintiff in any case, the 2nd defendant as an adversary to the plaintiff should be the last arbiter in determining whether there exist an advocate client relationship between the plaintiff and the firm of KHATIB & CO. ADVOCATES.
13. In my determination I find that to sustain this file as part of the courts data among the pending disputes when no dispute indeed exists would be to go against the overriding objective of the court.
14. Based on the documents filed by both sides there is no dispute that the subtraction of the litigation between the parties was compromised. I have no hesitation in finding and holding that the compromise was complete and this matter has no justification to be regarded as a pending litigation.
15. I say so noting that the calculation sheet relied upon by both sides discloses that there were independent costs, both legal and auctioneers fees in the aggregate sum of Kshs.445,000/= which formed the basis of the plaintiff obligation to the 1st defendant.
16. Additionally the deposit made by the plaintiff in the sum of Kshs.500,000 was made pursuant to the provisions of order 40 Rule 2 (2) which provides:-

***“The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”***

17.To me that was a security not for costs but to take care of any damage that could have been visited upon the Defendants as a result of the interim temporary injunction.

18.I refuse to be persuaded that it can be validly withheld in the absence of continuing litigation or indeed perpetually after the dispute has been compromised.

19.The upshot of the foregoing is that I allow the application dated 11.12.2015 order and declared that the suit has been wholly compromised and that the sum of Kshs.500,000 deposited in court as security shall hence be released to the plaintiff's advocate.

**Dated, signed and delivered at Mombasa this 19th day of February 2016.**

In the presence of:-

Ms.Akee for Khatib for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

**P.J.O.OTIENO**

**JUDGE**