



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 518 OF 2011**

**BETHANY VINEYARDS LIMITED.....1<sup>ST</sup> PLAINTIFF**  
**JOSEPH MUTURI KAMAU.....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**  
**EQUITY NOMINEES LIMITED.....2<sup>ND</sup> DEFENDANT**  
**PETER K. MUNGA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have asked the court to dismiss the plaintiff's claim against them.
2. The primary reason for that application is that the claim had been duly compromised, thus removing the very basis of any claim which the plaintiffs may have had against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
3. It is the position of those defendants that the loan facilities which **EQUITY BANK LIMITED** had advanced to the plaintiffs, **BETHANY VINEYARDS LIMITED** and **JOSEPH MUTURI KAMAU**, had been paid in full. Following the said payments, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had discharged the securities which the plaintiffs had earlier provided in respect to the loan facilities.
4. Therefore, **EQUITY BANK** and **EQUITY NOMINEES LIMITED** hold the view that there are no outstanding legal disputes between them and the plaintiffs. The bank had recovered the loan which it had earlier advanced to the plaintiffs. Thereafter, the securities were also released to the plaintiffs. In those circumstances, those two defendants could not fathom what more the plaintiffs still wanted to litigate over.
5. It was for that reason that the applicants asked the court to dismiss the case against them.
6. The applicants cited the case of **LUKAS OTIENO ODETE VS KIPKEBE LIMITED HCCC NO.4 OF 2002 (KISII)** as authority for the proposition that when parties negotiated a settlement, the matters in issue would be deemed to have been settled when the negotiated sum was paid.
7. In that case, there were judgments entered in the sum of Kshs.899,080/=. However, the parties thereafter engaged themselves in negotiations which culminated in the agreement that the three decrees be compromised through the payment of Kshs.749,080/-.
8. Although the sum of Kshs.749,080/= was less than the decretal amounts, the court declared that the payment of that agreed sum was a compromise, which therefore settled the suits.
9. A second authority that was relied upon by the applicants was **TRANS-NATIONAL BANK**

**LIMITED VS JAMES NYABUTI ANGWENYI HCCC NO.459 of 1998 (NAKURU).**

10. In that case the defaulter was sued by the plaintiff after he defaulted in the payment of a loan which he had borrowed.
11. After being sued, the defendant requested the plaintiff to waive the interest on the loan. The request was granted.
12. When the principal debt was cleared, the plaintiff filed a Notice of discontinuance of the suit. In response, the defendant filed a Bill of Costs, demanding that the plaintiff should pay the costs of the suit.
13. Kimaru J. came to the following conclusion;

*“The parties to the suit having agreed to compromise the suit at the instance of the Defendant, it is not open to the Defendant to now demand that he be paid the costs of the suit. The intention of the parties was to compromise the suit with each party bearing its own costs.”*

14. From those two authorities it is evident that a compromise is not synonymous with a settlement. A settlement may be on the basis of a sum equivalent to or less than the claim to which the claimant believes he is entitled to. However, a compromise connotes the acceptance of a sum that is less than what the claimant is entitled to.
15. But once the respondent to the claim has paid the agreed sum, the claim is deemed as settled, whether or not the agreed sum is less than that which the claimant believes that he is entitled to, as of right.
16. The applicants submitted that those two authorities were in *pari materia* to this suit. However, the applicants failed to demonstrate how those cases were comparable to this case.
17. The applicants also pointed out that the plaint did not seek any reliefs against the 2<sup>nd</sup> Defendant, **EQUITY NOMINEES LIMITED.**
18. The plaintiffs appear to acknowledge the fact that there was no specific relief sought against **EQUITY NOMINEES LIMITED.**
19. Nonetheless, the plaintiffs insisted that it was the said **EQUITY NOMINEES LIMITED;**

*“Who handled and witnessed the sale of the shares and eventually transferred the shares of the plaintiffs to the 3<sup>rd</sup> Defendant. The 2<sup>nd</sup> Defendant was a signatory and a witness to the sale and purchase transfer. Therefore, the 2<sup>nd</sup> Defendant is rightly enjoined in the suit.”*

20. I think that it is important to place these contentions within perspective.
21. First, it is common ground that the lender was **EQUITY BANK LIMITED.** Therefore, the “creditor-debtor” relationship which the applicants talk about was only as between the plaintiffs and **EQUITY BANK LIMITED.**
22. The loan was secured by;
  - a. Legal charges registered over 18 parcels of land located at **NGONG;**
  - b. Three million shares in **TRANS CENTURY LIMITED.** Those shares were owned by the 2<sup>nd</sup> plaintiff, **JOSEPH MUTURI KAMAU;**
  - c. Personal Guarantee of the 2<sup>nd</sup> plaintiff;
  - d. Corporate Guarantees by **FATIMA HOLDINGS LIMITED, CONSOLIDATED SECURITIES LIMITED and NIMEX LIMITED.**

23. The loan amount was in the sum of Kshs.33,307,700/-.

24. The 2<sup>nd</sup> plaintiff offered to sell his shares in **TRANS-CENTURY**

**LIMITED,** and the 3<sup>rd</sup> Defendant agreed to buy the said 3,000,000 shares.

25. The proceeds of sale were to be credited to the plaintiffs’

account at **EQUITY BANK LIMITED**.

26. By his Amended Defence, the 3<sup>rd</sup> Defendant, **PETER K. MUNGA**, confirmed that he agreed to buy the three million (3,000,000) shares belonging to **JOSEPH MUTURI KAMAU**, in Trans-century Limited.

27. He added that he had made payments as follows;

*“(a) A sum of Kshs.2,405,790/- directly to the 2<sup>nd</sup>*

*Plaintiff.*

*(b) A sum of Kshs.33,500,000/- or thereabouts to and for the 2<sup>nd</sup> plaintiff's benefits in accounts held with the 1<sup>st</sup> Defendant Bank.”*

28. According to the plaintiffs', the agreed purchase price for the

shares was Ksh.50/- for each share. That means that the sale of the shares should have raised Ksh.150,000,000/=.

29. However, the 3<sup>rd</sup> Defendant denied the plaintiffs' contention regarding the purchase price. That would imply that although the 3<sup>rd</sup> Defendant agreed to buy the shares, there was no agreed purchase price.

30. Nonetheless, the 3<sup>rd</sup> Defendant went on to make reference to; “the agreed consideration;” without specifying what constituted the said agreed consideration.

31. It is **EQUITY BANK** which was the lender. And **EQUITY BANK** has not shown that there was an agreement between it and the plaintiffs, pursuant to which the bank received a lesser sum of money than was due from the plaintiffs.

32. The acceptance of a lesser amount of money would constitute the surrender of the remaining portion of the bank's entitlement and would thus be a concession to the plaintiffs. That would be in line with the definition of the word “compromise”, as pointed out by the applicants from the “Black Law Dictionary” 8<sup>th</sup> Edition, which reads as follows;

*“An agreement between two or more person(s) to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim which each party surrenders something in concession to the other.”*

33. In this case, the plaintiffs have not alleged any compromise. It

is the applicants who say that there had been a compromise. Therefore, the applicants ought to have demonstrated the existence of the alleged compromise.

34. On a *prima facie* basis, I find that the applicants have failed to demonstrate any compromise between them and the plaintiffs.

35. To the extent that the application dated 5<sup>th</sup> July 2013 was premised on the alleged compromise, it must therefore fail.

36. Meanwhile, the plaintiffs are asking for leave to amend the  
plaint.

37. It is significant that the original Plaintiff was filed on 21<sup>st</sup>

November, 2011. I say that it is significant because on 19<sup>th</sup> December 2011 the bank informed the plaintiff that the loan facility which the bank had accorded to the plaintiffs, had been paid in full. In effect, the claim by the plaintiffs', at the material time, must be put within the proper perspective.

38.They were demanding;

- i. *A statement of Account;*
- ii. *An order that the bank should credit their account with the balance of the proceeds from the sale of the 3 million shares which the 3<sup>rd</sup> Defendant bought for Kshs.150,000,000/=;*
- iii. *Unconditional release of the securities which had secured the loan;*
- iv. *Damages for non-user of the securities, from the date when the shares were sold;*
- v. *Interest at 18% per annum from the date the suit was filed;*
- vi. *An injunction restraining the defendants from releasing the securities.*

39.According to the plaintiffs, the 3 million shares were sold prior

to 3<sup>rd</sup> June, 2011. Before the shares were sold, they were held by **EQUITY NOMINEES LIMITED** on behalf of **EQUITY BANK LIMITED**.

40.And immediately after the sale, the **EQUITY NOMINEES**

**LIMITED** are said to have become obliged to transfer the shares to **PETER K. MUNGA**.

41.It does appear that the balance of the loan payable to the bank

was about Kshs.34,000,000/=.

42.Therefore, if **PETER MUNGA** paid Kshs.150,000,000/= for the

shares, the plaintiffs account at **EQUITY BANK** should then have had a credit of more than 100,000,000/-, after the bank loan was cleared.

43.All those assertions are spelt out in the original plaint.

44.However, the bank did discharge the securities in or about 19<sup>th</sup>

December 2011. Therefore, the demand for the release of the securities had now been overtaken by events.

45.The plaintiffs proposal to amend the plaint to reflect the fact

that the loan facility had now been paid and that the title deeds which had been charged to the bank had been discharged.

46.In my considered view, that proposed amendment cannot be

prejudicial to the any of the defendants.

47.Notwithstanding the bank's confirmation that the loan had been

paid in full, the plaintiffs still insist that there was an obligation on the defendants to make full disclosure about the status of the plaintiffs account at **EQUITY BANK**.

48.The primary facts asserted by the plaintiffs remain unchanged,

save for the fact that the securities had been discharged.

49. I find that the proposed amendments are simply designed to reflect the developments which took place after the original plaint was filed.

50. I also find that the proposed amendments bring to the fore, the real remaining issues, which require determination. I say so because the plaintiffs allege that the 3 million shares in Transcentury Limited were sold for Kshs.150,000,000/-.

51. If that be the case, the plaintiffs will need to prove that contention, if it is denied by the defendants.

52. The money was to be paid by **PETER MUNGA**. If he paid for the shares, he will need to prove that fact.

53. If **PETER MUNGA** did not pay for the shares or any of them,

**EQUITY NOMINEES LIMITED** will be accountable to the plaintiff for the shares which had not been paid for.

54. But if **PETER MUNGA** paid for all the shares which he bought, it would be necessary for **EQUITY BANK** to demonstrate the amount of money it received, as payment for the loan.

55. Evidence of the amount of money received by **EQUITY BANK**

would enable the plaintiffs' to know whether or not they should be asking the bank to give them the rest of the money which was due to the plaintiffs after the loan was cleared.

56. In effect, all the defendants are necessary parties to this suit,

as their participation would provide an opportunity to the court to resolve all the issues in dispute.

57. If the shares realized Kshs. 150,000,000/-, it would be interesting to learn how such a large sum of money was used to pay off the loan, which, in my *prima facie* view, should not have exceeded Kshs. 40,000,000/-.

58. Of course, I do appreciate that there were some statutory charges and taxes that were also payable from the proceeds of the sale of the shares. There could also have been Commissions payable to Dyer & Blair Limited.

59. But it would appear that all the defendants are necessary parties to the suit, if the matters in issue are to be resolved conclusively.

60. I dare say that if the **EQUITY NOMINEES LIMITED** and **PETER K. MUNGA** provided all the evidence needed to prove that the 3 million shares were sold and that Kshs. 150,000,000/- was thereafter remitted to **EQUITY BANK**, they would have gone a long way to helping the court narrow down the issues in contention.

61. Similarly, if **EQUITY BANK** confirmed the exact sum of money which it received, and how it was utilized, the whole case would be quickly resolved.

62. But, until the defendants provide the requisite proof, it may be futile to have any of them simply remain as witnesses, when there was a possibility that one or more of the defendants could end up being found liable to the plaintiffs.

63. If any of the defendants ultimately exonerates itself, the court would award them requisite costs.

64. In the final analysis therefore, the plaintiffs' are granted leave to Amend the Plaint.

65. The costs of the application dated 24<sup>th</sup> April 2014 are awarded to the plaintiffs. Meanwhile, the 1<sup>st</sup> and 2<sup>nd</sup> defendants will pay to the plaintiffs' the costs of the application dated 5<sup>th</sup> July 2013.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **29<sup>th</sup>** day of **January** 2015.

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

..... for the 1<sup>st</sup> Plaintiff.

..... for the 2<sup>nd</sup> Plaintiff.

.....for the 1<sup>st</sup> Defendant.

.....for the 2<sup>nd</sup> Defendant.

.....for the 3<sup>rd</sup> Defendant.

Collins Odhiambo – Court clerk.