



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPL. NO. 95 OF 2019

ANDREW & STEVE ADVOCATES.....ADVOCATES/RESPONDENT

VERSUS

PARAGON ELECTRONICS LIMITED.....CLIENT/APPLICANT

RULING

1. This ruling relates to a series of three files Misc. Appl. No. 94, Misc. Application No.95 of 2019 and Misc.96 of 2019. A ruling was delivered on 29.10.2020 by the taxing master relating to the Advocate's Client's Bill of Costs. Thereafter, the parties recorded a consent dated 19.4.2021 to have the matters marked as settled. Subsequently, thereafter the advocate filed an application dated 19.10.2021 to set aside the consent while the client filed an application dated 18.11.2021 to stay the prosecution of the earlier application.

2. Considering that the two applications relate to the negotiations in the agreement culminating into the consents of 19.4.2021 and seeing that the court is already in the process of determining the application of 19.10.2021, then I will consider the application of 18.11.2021 as a response to the application of 19.10.21. To this end, this court is guided by the provisions of Section 1A and 1B of the Civil Procedure Act to the effect that the courts have a mandate to actively manage cases, in a manner that meets the overriding objective set out in the Act.

The Application dated 19.10.2021.

3. The Advocate prays that the consent dated 19.4.2021 be expunged and the order to apply in the other files. The Advocate avers that the client had withdrawn the suits **ELC. No. 1205 of 2015 (Esther Adhiambo Ongany v Carilus Osambo Ademba & Paragon Electronics Limited, ELC. No. 215 of 2017 (Paragon Electronics Limited v Ousainour Ngum & Khadi Jatou)** and **ELC No. 178 of 2017 (Paragon Electronics Ltd & Remak Properties v Yusuf Shorofally Esufali & Amama Yusuf)** all in late 2018. Subsequently the advocate initiated the proceedings in **Misc. No. 94 of 2019, Misc. No. 95 of 2019 and Misc. 96 of 2019** by way of Advocate – Client Bill of costs which the taxing master gave a ruling on 29.10.2019 for the bill of costs dated 29.5.2019.

4. The client thereafter filed a reference in the 3 matters dated 1.12.2020 challenging the decision of the taxing master.

5. The parties however recorded a consent marking the suit as fully settled with no orders as to costs.

6. The Advocate contends that negotiations had been done in a consolidated manner for several related matters which were reduced into different settlement agreements and addendums. However, the Advocates noted that the client was only pushing for withdrawal of certain matters, and stated that they were not inclined to settle any other matters until they received the said settlement agreement and addendums.

7. The advocate further contends that they only executed the consent in good faith but they now stand to be prejudice by the said consent hence their prayer that the consent be expunged. It is further argued that the advocate did express their sentiments to the Deputy Registrar even at the point of adoption of the consent as an order of the court. The advocate states that it is the Client who failed to execute their part of the duly forwarded executed addendum, and that the delay thereof is inordinate, malicious and no reasons have been advanced for such a delay.

Application dated 18.11.2021

8. The client prays for a stay of proceedings relating to the application dated 19.10.2021 pending the hearing and determination of the said application of 19.10.2021 as well as the hearing and determination of **Milimani CMCC E11231 of 2021 (Paragon Electronics Ltd vs. Stephen Kimathi Mutiso T/A Andrew Stence Advocates)** and for the orders to apply in Misc. Appl. No. 94 of 2019, Misc. Appl. No. 95 of 2019 and Misc. Appl. No. 96 of 2019.

9. The Client herein avers that the parties had agreed to cease active litigation by executing a deed of settlement culminating in the consent recorded in court. It is averred that the advocate only partially complied with the deed of settlement prompting the client to file the suits **CMCC E11231 of 2021** at Milimani Chief Magistrate Court seeking orders of specific performance.

10. The Client avers that it is after the suit was filed at the Chief Magistrate's Court that the advocate filed the application dated 19.10.2021. The Client contends that the application of 19.10.2021 is *subjudice* to the matter filed at Chief Magistrate's Court and is also an abuse of the Court's Process.

Determination

11. I have considered all the material presented before me. The issue for determination is whether the consent of 19.4.2021 should be set aside or not.

12. In the case of **Flora N. Wasike V Destino Wamboko (1988)eKLR**; it was stated that:

“ Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings, or action and or those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”.

13. The consent dated 19.4.2021 was brought to court almost a month later on 17.5.2021 for adoption. There in between, no application was made to halt the process of adopting the consent as an order of the court.

14. On 17.5.2021, both parties were represented in court before the Deputy Registrar of which, counsel for the advocate is the one who addressed the court as follows:

“We have executed a consent....”

Counsel for the client then stated;

“We have the consent in court.”

The court then proceeded to record the following;

“The consent dated 19.4.2021 is adopted as an order of the court. The file is closed.”

15. Thereafter the counsel for the advocate started expressing reservations about the consent.

16. I find that the consent adopted by the court was duly executed by the advocates as it was. The issue regarding the nature and extent of negotiations were not displayed in the consent. A perusal of the said consent dated 19.4.2021 simply reads:

“the matter be and is hereby marked as fully settled with no orders as to costs.”

17. This court cannot now be called upon to delve into the nature of the settlement agreements or whether the negotiations had been reduced into different deeds of settlement, for the simple reason that such agreements have now birthed new causes of action. To this end, the client has disclosed that they did file the suit at Milimani Chief Magistrates Court **Case No. E11231 of 2021** for specific performance.

18. The advocate was fully aware that the consent, once presented in court became an order of the court and cannot be discharged unless on the grounds of setting aside a consent judgement.

19. Secondly, it is apparent that the dispute relating to the nature and extent of the settlement agreement, is now before a court of law in **CMCC. E.11231.2021** where the client has sought orders of specific performance. It is the view of this court that setting aside the consents herein will bring back the matters which were closed on 17.5.2021 yet there is an active matter that is ongoing before another court.

20. In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 Others exparte Law Society of Kenya (2020)** Mativo J stated that:

“ The subjudice rule, like other maxim of law had a salutary purpose. The basic purpose and the underlying object of sub-judice was to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and same relief. That was to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by the two courts in respect of the same relief and was aimed to prevent multiplicity of proceedings”

21. There is certainly no concurrent jurisdiction between this court and the Chief Magistrates' Court. Nevertheless the scenario envisaged in the case law above is applicable herein. The setting aside of the consent would certainly result in multiplicity of proceedings and would have the potential of creating confusion and or different verdicts. This in turn would amount to an abuse of the court's process.

22. Still in the case of **Republic v Paul Kihara Kariuki (Supra)**, it was stated that:

“litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation was a contest by judicial process where parties place on the table of justice their different positions clearly, plainly and without tricks. Pursuing two processes at the same time constituted and amounted to an abuse of the court and/legal process”.

23. What I discern is that the parties now have a commercial dispute appertaining to the deeds of settlement and they ought to pursue their claim to their logical conclusion before the court seized of the matters.

24. I find no plausible reasons to justify the setting aside of the contents of 19.4.2021.

25. **Final Orders**

1.The application dated 19.10.2019 is dismissed with costs to the Client/Respondent.

2.The application dated 18.11.2021 is marked as SPENT.

3.All the three Misc. Appl. files Nos. 94, 95 and 96 of 2019 stand as closed.

4.This ruling is to be placed on each of the three files.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mwaniki for the Advocate

Kimtai holding brief for Atula for the client

Court Assistant: Eddel Barasa