**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE NO. 39 OF 2012**

**MANYOTA LIMITED (KENYA) ……. APPLICANT**

**VERSUS**

**ZTE CORPORATION (KENYA) …… RESPONDENT**

**R U L I N G**

1. The Claimant has come before this Court by what it terms an *ex parte* Chamber Summons dated 18th February 2013 seeking to have the arbitral Award of the sole arbitrator **Chikwendu Madumere** dated 29th December 2012 recognised as binding and the same being adopted as a Judgement of this Court. The Application is pursuant to the provisions of **section 36** of the *Arbitration Act* and **Rules 4 (1) & (2), 6, 9 and 11** of the *Arbitration Rules 1997*. It is also brought under the general provisions of **section 3A** of the *Civil Procedure Act*. The Application was based upon the following grounds:

   **"1. THAT a dispute arose between the Claimant/ Applicant and the Defendant/Respondent with regard to payment of work done whereof the parties agreed for the appointment of a Joint Arbitrator by the international Chamber of Commerce (ICC).**

   **2. THAT the consensual arbitral proceedings commenced culminating into a final award dated 29th December 2012 which was in favour of the Claimant/Applicant for the sum of USD 265,185.86, Costs of the Arbitration of USD 30,000 and Legal Fees of Kshs. 3,000,000 plus arbitration costs thereto.**

   **3. THAT no application to set aside the arbitral award pursuant to the provisions of section 35 of the Arbitration Act or at all has been made under.**

   **4. THAT therefore there are no grounds/reasons to warrant a refusal of the recognition or enforcement of the arbitral award.**

   **5. THAT this Honourable court has the power to award the orders sought and it is in the greater interest of justice that the said orders be granted".**

2. The Applicant's said Application was supported by the Affidavit of **James Njukia Ihura** the Managing Director of the Claimant Company sworn on 18th February 2013. The deponent

detailed the history of the dispute that was referred to the arbitrator who had been appointed by the ICC International Court of Arbitration. The Award had been delivered on 29th December 2012 and had been forwarded to the said International Court. The deponent further noted that the Award had been lodged in this Court and that to date, the Respondent had neither applied for nor obtained orders to set the same aside. Notice of the filing of the award had been sent to the Respondent but had not triggered any action on its part. Mr. Ihura expressed the opinion that all litigation must come to an end and consequently it was only just and fair that the Orders sought in the Application be allowed.

3. The Advocate who has the handling of this matter on behalf of the Respondent, **Michi Kirimi** swore a Replying Affidavit to the Application on 19th July 2013. Although admitting the Award, the deponent noted that subsequent thereto and by a Settlement Agreement (hereinafter "the Settlement Agreement") dated 12th April 2013, the Applicant had agreed that in consideration of the payment of US$ 350,393.60 by the Respondent, it would release and discharge the Respondent from any and all claims on account of the Award. Payment of the agreed sum had been made in full. As the Award had been settled, Ms. Kirimi maintained that there was no longer any pending Award for enforcement as a Judgement of this Court. When the deponent had raised this fact with the advocate on record for the Applicant on 16th July 2013, she had been informed that further interest was payable on the US dollar amount. Indeed, the deponent then received a letter dated 16th July 2013, a copy of which she annexed to her said Affidavit, which indicated that a further sum of US$4202 was due to the Claimant.
4. On 2nd December 2013, the parties agreed that the Application would be dealt with by way of written submissions. The Submissions of the Claimant were filed on 19th December 2013 while the Submissions of the Respondent were filed on the 15th January 2014. The Claimant commenced its Submissions by setting out the brief facts of the matter as well as referring to the Affidavits for and against the Application before Court. The Applicant identified the following issues arising for determination:
    a. **Whether there is any pending award for enforcement?**
    b. **Whether interest is payable to the claimant?**
    c. **Which party ought to pay the costs of this application?**

As regards a. above the Claimant submitted that the Award remained unsatisfied by the Respondent until the current Application was filed. It maintained that it was only after the filing of the Application that the Respondent made arrangements to settle the amounts in contention. Then, on 17th April 2013 the Claimant had proposed that the parties execute a Settlement and Release Agreement (the Settlement Agreement). Such was entered into on the undertaking that the payment of the amount owing as per the Award together with interest thereon would be made on or before 15th May 2013. The Claimant maintained that the Respondent failed to honour the terms of the Settlement Agreement. As a result, the Claimant's advocates had written to the Respondent's advocates that the latter's failure to honour the Settlement Agreement would be considered as avoidance of the same and that the Claimant would seek full settlement of the amount of the Award together with interest thereon.

5. The Claimant went on to say that owing to the breach of the Settlement Agreement by the Respondent, this Application was fixed for hearing. It was only upon such fixing that the Respondent paid an initial instalment of US$265,185.86 leaving an outstanding balance of US$85,208.00 plus interest of US$4202. The amount of US$85,208.00 had been settled on 12th July 2013 but the interest as above, remained unpaid to date. It maintained that the Settlement Agreement had not been complied with and consequently accrued interest. To this end, the Claimant submitted and referred to paragraph 6.3 at page 40 of the Award in which the Arbitrator had provided for simple interest to be payable at the rate of 20% from the date of the Award until the date of payment. The Claimant detailed that the Settlement Agreement had provided for settlement of the Award amount and the interest thereon by 15th May 2013. As the Respondent had not paid by this date, interest should have continued to accrue until 12th July 2013 when the final amount as per the Award was paid. The Claimant put the interest amount at US $4202 with interest upon interest also at US$4202 giving a total of US$8404.
6. In turn, the Respondent submitted that the Settlement Agreement once executed constituted a compromise of the Award and as a result, the Award thereafter ceased to have any effect. The

Respondent maintained that, as the agreed sum was paid in full, the matter is at an end. To this end it referred to the cases of **Adiel Murithi Philip v Thomas Maingi (2007) eKLR, Ismail S. Hirani v Noorali E. Kassam (1952) 1 EA 131** and **Thorpe v Fasey (1949) 1 Ch 649**. The Respondent maintained that the parties to the Settlement Agreement had fixed the interest payable which had been paid in full and, as a result, the Claimant was not entitled to any further interest as it claimed. The Respondent noted that whilst it was unfortunate that there was a delay in the payment of the agreed sum, this could not have entitled in the Claimant to rescind the Settlement Agreement. The recision of contract meant a reversion to status quo and as payment had been made, this was not the case here.

7. Presumably as the Claimant did not wish to rely upon the same, it did not attach a copy of the Settlement Agreement to its Affidavit in support of the Application before Court. It was left to the Respondent in its Replying Affidavit, to put before this Court a copy of the Settlement Agreement. I have perused that document thoroughly. At paragraph 2 thereof it reads:

> **"2. It is expressly understood, acknowledged and agreed that this is a full and final settlement and release and applies to all known and unknown or unanticipated claims, causes of action, losses, damages or rights arising out of the said Award, and Contract described above."**

In this regard, the Award is that of the Arbitrator dated 29th December 2012 and the Contract relates to the **NOFBI** sub contract which was exhibited as **"JN 2"** to the Supporting Affidavit. Further, paragraph 4 of the Settlement Agreement:

> **"This Agreement contains the entire agreement between the parties hereto and is intended as a full and final expression of their settlement and release of claims. The terms of this release are contracted and not mere recital."**

In my view, the Settlement Agreement arose out of the said Award and the said Contract and as a result, supercedes both.

8. In its submissions, the Claimant stated that the Settlement Agreement dealt with the question of interest thereafter. Regretfully I can see no reference to interest in that document save for paragraphs 4 of Annex 'A' which reads:

> **"Simple interest on 1, 2, and 3 at 20% p.a. For 105 days and fixed as at 12th April 2013."**

Paragraphs 1, 2 and 3 of the said Annex 'A' cover the amount awarded in the Award dated 29th December 2012, the costs of the arbitration and the Claimant's legal fees which, together with the interest element totaled US$350,393.60. Annex 'A's description at the bottom of page 2 of the Settlement Agreement details:

> **"Computation of total sums payable to Manyota Limited."**

9. I have taken into account the Affidavits in support and against the Claimant's Chamber Summons dated 5th February 2013 as well as the parties' submissions thereon. I have also considered the authorities cited by the Defendant to Court. From those I found most assistance from the case of **Hirani v Kassam** in which it was held:

> **"(i) Where a compromise is recorded under Order 24, rule 6, the decree is passed upon a new contract between the parties superseding the original cause of action.**
>
> **(ii) The compromise of a disputed claim made bona fide is a good consideration and the Court cannot interfere with it in circumstances which would afford good ground for varying or rescinding a contract between the parties.**

**(iii) No ground has been shown to justify any Court in interfering between the parties."**

That finding was amplified in the Judgement of **Sir Newnham Worley (Vice-President)** when the learned Judge detailed as follows:

**"I think the fallacy in the appellant's arguments is that they fail to distinguish between two types of cases in which judgments may be entered by consent. The first case is where a defendant submits to judgment on the claim but asks for time to pay, or makes an offer to pay in instalments which the judgment creditor accepts. In such a case the judgment is founded upon the original cause of action, i.e. the original contract. Order 20, rule 11 (2), would apply to any order made for payment by instalments and it may well be that, though there is no express provision in the rules for review of such an order, the Court would in a proper case exercise such a power on the application of either party. However, it is not necessary to decide that point now.**

**The other case is where the suit has been settled by a compromise recorded under Order 24, rule 6, which is the present instance. In such case, the decree is passed upon the new contract between the parties which supersedes the original cause of action. As Parke, J. said in *Wentworth v. Bullen* (1829) 9 B & C. 841 at page 850: 109 E.R. 316, "the contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of a Judge". Mr. Khanna has boldly averred that this compromise is *nudum pactum* and not enforceable for lack of consideration; consenting to judgment, he said, is no consideration for an agreement. He adduced no authority to support this pontifical statement, which is perhaps not surprising seeing that the contrary view was held as far back as 1612 in *Pooley v. Gilberd* 2 Bulst 41:80 E.R. 943 and again in 1617 in *Bidwell v. Catton Hob.* 216: 80 E.R. 362. In the former case it was said, "the forbearance and stay of this suit is a great case to the defendant in regard to travers and expenses: and this is a good consideration and so the whole Court agreed clearly". Subsequent cases have been chiefly concerned with such questions as whether forbearance to prosecute a groundless or doubtful action, afforded good consideration capable of supporting a promise, and it is now settled that the compromise of a disputed claim made bona fide is a good consideration, even although it ultimately appears that the claim was wholly unfounded: aliter, if the claim was not made in good faith: *Callister v. Bischoffscheim*, (1870) L.R. 5 QB. 449; *Holsworthy U.D. v. R.D.C. of Holsworthy*, (1970) 2 Ch. 62.**

**I am therefore, in entire agreement with the following passage in Windham, J's judgment:–**

**The mode of paying the debt, then is part of the consent judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The positition is clearly set out in Seton on Judgments and Orders (7th Edition), Vol. 1, page 124, as follows:**

**'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 on 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement'."**

10. Upon the strength of that authority which is binding upon me, I find that in this case the parties came to a compromise in relation to the Award of the learned Arbitrator and embodied the same in the Settlement Agreement. That document quite clearly does not contain any provision for the payment of interest on the agreed settlement amount of US$350,393.60. The Settlement Agreement was reached outside those of the arbitral proceedings and the proceedings before this Court. In my view, I would emphasise the finding of **Windham J** as cited above:

**"The mode of paying the debt then is part of the consent judgement. That being so, the Court**

**cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."**

So too here, I see no reason why this Court should interfere with what has been detailed by the parties themselves in the Settlement Agreement. As there was no provision for interest thereunder, I find that the Claimant's claim for interest and indeed, interest upon interest, fails.

11. As a result, I dismiss the Claimant's Chamber Summons dated 5th February 2013 with costs to the Respondent.

**DATED and delivered at Nairobi this 29th day of May, 2014.**

**J. B. HAVELOCK**

**JUDGE**