



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 242 OF 1995**

**JAVAN LEWA**

**MUTE.....PLAINTIFF**

**VERSUS**

**SHIVA ENTERPRISES LTD.....DEFENDANT**

**RULING**

**\*\*\*\***

Before this court is the Notice of Motion Application dated 25.7.2013 in which the 1<sup>st</sup> Defendant/Applicant seeks the following orders:

- “1.THAT the plaintiff’s suit against the 1<sup>st</sup> defendant be marked as adjusted wholly in terms of the agreement reached on 17<sup>th</sup> March, 2010 as contained in the letter dated 10<sup>th</sup> March, 2010 and the adjustment be recorded and entered as a judgment in accordance therewith.**
- 2. THAT this Honourable court do make any further orders necessary for the implementation and execution of the terms of the decree.**
- 3. THAT the costs of this application be borne by the plaintiff.”**

The application was opposed by the plaintiff/Respondent who filed his replying affidavit dated 2/10/2012. **MR. KADIMA** Advocate acted for the plaintiff in the matter whilst **MR. AHMED** appeared for the 1<sup>st</sup> defendant. By consent it was agreed that the application be disposed of by way of written submissions and both parties did duly file their submissions in court.

The basis of this suit is a parcel of land measuring 12.5 acres within Kijipwa in Kilifi District. The plaintiff claimed that the suit land was held in trust for him by the 3<sup>rd</sup> defendant and further claims that he and his family have been living on the suit land for generations and as such is entitled to the same by way of adverse possession. The plaintiff challenged the allocation of the suit land to the 1<sup>st</sup> defendant and filed an amended plaint dated 18.4.1995 seeking various declaratory orders and seeking an injunction against any attempt to evict him from the suit land. The parties began to communicate after the suit had been filed and have been negotiating with a view to reaching a settlement over the matter. Annexed to this application is a bundle of letters as evidence of such negotiation. The 1<sup>st</sup> defendant contends that a compromise was reached by which two (2) acres was to be carved out of the suit land and transferred to

the plaintiff. However the plaintiff whilst conceding to have participated in negotiations with the 1<sup>st</sup> defendant denies that any compromise/settlement was reached. The 1<sup>st</sup> defendant avers that the plaintiff has been reluctant to sign a proposed consent based on the alleged compromise hence this application seeking to have the suit marked as ‘adjusted?’

I have carefully considered the facts of this case, the documents on record as well as the submissions filed by counsel. The 1<sup>st</sup> defendant relies on order 25 rule 5 (1) (2) of the Civil Procedure Rules which provides as follow:

**“5 (1) where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreements compromise or satisfaction be recorded and enter judgment in accordance therewith.**

**2. The court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.”**

The key question to which this court must address its mind is whether there was in fact any compromise leading to the adjustment of the suit. At the same time the court must exercise great care not to impose an adjustment/compromise upon an unwilling party and not to descend into the arena of the dispute.

It is conceded by both parties and there can be no doubt that negotiations were underway. An agreement to compromise a suit must be established by the general principles which govern the law of contract. In the case of **STOPER – VS – MANCHESTER CITY COUNCIL [1974] 3 ALL GR** Lord Denning held that

**“A contract is formed when there is, to all outward appearances a contract.”**

From the correspondence between the parties some of which is marked without prejudice the plaintiff asked to be allocated 50% of the suit land. The 1<sup>st</sup> defendant on their part offered the plaintiff 2 acres of land. The defendant rejected this and requested to be allocated 6 acres. In a final letter dated 10.3.2010 written by the plaintiff to the 1<sup>st</sup> defendant he indicated acceptance of their offer for two (2) acres of land. A consent was drafted in those terms but the plaintiff never signed the consent to enable it be tabled before the court. If this was all that had happened then I may have been inclined to allow this application.

However during the course of the negotiations the 1<sup>st</sup> defendant on 28.1.2010 filed a Notice of Motion seeking dismissal of the entire suit. It had earlier been agreed that the application for dismissal of suit would only proceed in the event that the parties could not reach an agreement. However despite this the 1<sup>st</sup> defendant’s advocate proceeded to file submissions in respect to the application to dismiss. On his part the plaintiff failed to file any reply to this application for dismissal and only filed his submissions 19 days after the 1<sup>st</sup> defendant had filed theirs. By pursuing the application to dismiss whilst negotiations to settle were underway is a clear indication that no compromise had been reached. Indeed at this point would venture to say that **“all bets were off”**. The actions of the 1<sup>st</sup> defendant indicate that they wished to have the matter resolved in court, or else they would have withdrawn their application for dismissal and allowed for negotiations to be concluded. As it turns out the application for dismissal was dismissed by **Hon. Justice M. Ibrahim** in his ruling dated 14/8/2012. It is only after this dismissal that the 1<sup>st</sup> defendant opted to pursue this present application. All in all I find that no concrete compromise has been reached. The issue of costs is yet to be determined. Therefore this application is premature. I therefore dismiss this application in its entirety and award costs to the plaintiff.

In view of the age of the suit I further direct that this suit be set down for hearing on priority basis and in any event not later than 90 days from today’s date – that is of course barring the filing of any consent in court.

**Dated and Delivered in Mombasa this 28<sup>th</sup> day of June 2013.**

No appearance by either party.

**M. ODERO**

**JUDGE**

**28/6/2013**