



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 717 OF 2009

ANWAR MAHENDRA PANDYA PLAINTIFF

VERSUS

BUSINESS FORMS AND SYSTEMS LIMITED 1ST DEFENDANT

ALOWIYA MAHENDRA PANDYA 2ND DEFENDANT

AMAR MAHENDRA PANDYA 3RD DEFENDANT

SAGE REGISTRARS 4TH DEFENDANT

R U L I N G

1. What is before this Court for determination is the Plaintiff's Notice of Motion dated 10th May 2013 brought under the provisions of **Order 24 rule 4 (1)** and **Order 8 rule 3** of the *Civil Procedure Rules, 2010*. The Application seeks that Messrs. **Amar Mahendra Pandya** and **Zarqa Nadeem Ahmed** being the legal representatives of the late **Alowiyah Mahendra Pandya**, the second Defendant herein, be made parties to the suit by way of substitution. As a result, the Plaint dated 28th September 2009 needs to be amended in terms of the draft Amended Plaint attached to the said Application. The same was predicated on the grounds that the second Defendant died on 28th May 2012 and Messrs. Pandya and Ahmed are the legal representatives of the Estate. Leave of this Court is required for the substitution.
2. The Application was supported by the Affidavit of the **Anwar Mahendra Pandya**, the Plaintiff herein sworn on 10th May 2013. The deponent recounted that on 11th February 2011, an Order was made directing *inter-alia* that a competent inspector be appointed to investigate the affairs of the first Defendant Company. The deponent detailed that the investigations were conducted by Ngwili & Co, auditors and accountants, who had reported that the second and third Defendants herein had misappropriated Shs. 176,303,060/- from the first Defendant Company. Then on 25th May 2012, the second and third Defendants had contracted to sell their shares in the first Defendant Company to the Plaintiff deponent. The Plaintiff annexed to his said Affidavit a copy of the Share Purchase Agreement (hereinafter "the Agreement") entered into but which had not been completed owing to the death of the second Defendant on 28th May 2012. The Plaintiff annexed to his said Affidavit a copy of the second Defendant's Death Certificate. He then recorded that the third Defendant had executed a Deed of Variation in relation to the Agreement in order to enable the completion of the sale of his shares in the first Defendant Company. In that Deed of Variation, the Plaintiff stated that the third Defendant had represented that he was the sole beneficiary of the Estate of the second Defendant which later turned out to be untrue after the

Plaintiff's Advocates had perused the file in respect of the Probate to the second Defendant's Will. The Plaintiff wished to pursue both the claims in the suit and specific performance of the Agreement as against the legal representatives of the second Defendant as well as against the third Defendant. As a result, he wished to enjoin Messrs. Pandya and Ahmed as aforesaid to this suit and amend the Plaintiff accordingly.

3. On the 10th June 2013, the said **Zarqa Nadeem Ahmed** swore an Affidavit in response to the Notice of Motion of the Plaintiff and his said Affidavit in support thereof. He opposed the Application and referred to the provisions of the Agreement dated 25th May 2012. The same had provided *inter-alia* that the parties would withdraw this suit *HCCC No. 717 of 2009* as well as *Winding-up Cause No. 6 of 2011* in relation to the first Defendant Company. It had been further agreed that a sum limited to Shs. 8,000,000/- would be retained out of the balance of the purchase price for the said shares, for a period of two years, to cater for any loss or damage that may arise out of the provisions of the Agreement. As a result, the deponent maintained that these proceedings before Court had been settled and consequently all that remained was for the parties to take formal steps in his words:

“memorialising such in the record of this Honourable Court”.

4. The deponent also maintained that the alleged forensic audit carried out by the accountants and auditors had been settled purportedly pursuant to an interim Order granted by this Court on 11th February 2011 in which the parties had agreed to settle the entire suit. The deponent went on to say that he believed that the sum of Shs. 60 million being the purchase price at clause 2 of the Agreement did not reflect the true value of the shares purchased by the Plaintiff. He noted that after the death of the second Defendant, the Plaintiff had contractually agreed and committed himself to the completion of the Agreement by entering into the said Deed of Variation dated 20th July 2012. That Deed had provided the setting aside of the Shs. 8 million as above as well as the Plaintiff, as purchaser, undertaking that he would complete the purchase of the shares of the second Defendant as per the Agreement. Mr. Ahmed stated that the total purchase price for the shares in the first Defendant Company was Shs. 60 million out of which the Plaintiff had paid Shs. 22 million leaving a balance of Shs. 38 million. Finally, the deponent maintained that there was no conflict as between the said Deed of Variation and the Will of the second Defendant. He confirmed that as the executors of the second Defendant's Estate, he and his co-executor the said **Amar Mahendra Pandya**, would honour the terms of the Agreement.
5. The 3rd Defendant swore a Replying Affidavit and filed the same on 25th June 2013. He confirmed that he was one of the two executors of the Will of his late mother who was the 2nd Defendant herein. He repeated the contents of Zarqa Nadeem Ahmed's said Affidavit dated 10th June 2013 in so far as the contents of the Agreement were concerned. He reiterated the position that these proceedings had been settled under the Agreement and had only required formal steps to detail such in the record of this Court. He further stated that the Agreement had been entered into so as to bring to an end all the long-standing and acrimonious disputes between the parties hereto. The figure that had been agreed of Shs. 60 million for the 66% shareholding in the 1st Defendant Company, which the Plaintiff had agreed to pay, had been heavily discounted in view of the value of the 1st Defendant Company's property held in its name which was worth alone at least Shs. 160 million.
6. After his mother's, death on 28th May 2012, the deponent had received, through his advocate, a draft Deed of Variation forwarded in order that completion may be performed of the Agreement without intermeddling with the 2nd Defendant's Estate. He had signed the Deed of Variation in good faith without the benefit of legal advice, on the basis of representations made to him by the Plaintiff and his advocates. In his opinion, the said Deed of Variation operated to the benefit of the Plaintiff in respect of the provision of completion documents and the payment of the agreed purchase price for the shares over a period. He had been advised by his current Advocate on record, that the said Deed of Variation was invalid, unlawful and of no legal effect. He went on to say that on 25th July 2012, he had delivered the completion documents as per the Deed of Variation to the Commercial Bank of Africa which included the transfer of his shares in the 1st Defendant Company. The Plaintiff and his wife, as his nominee, now held the majority of shares in the 1st Defendant Company. On the pretext of changing the 1st Defendant's bankers from the

Commercial Bank of Africa to Prime Bank Ltd, the Plaintiff had approached him to either provide a personal guarantee to that bank or resign as a director of the 1st Defendant Company. The deponent had chosen the latter route. By letter dated 22nd April 2013, the advocates had forwarded the Grant of Probate to the Plaintiff's advocates with the request that he should now make the payments due under the Agreement. It was only now that the deponent understood that the Plaintiff, rather than completing the Agreement, maintained that he had a substantial claim against the deponent's late mother and himself. As far as he was concerned, the Application before this Court was a deliberate attempt by the Plaintiff to open up concluded matters so as to avoid paying in full for the shares under the Agreement.

7. With the leave of the Court granted on 11th June 2013, the Plaintiff swore and filed a Further Affidavit dated 1st July 2013. He submitted that the Agreement as aforesaid could not be relied upon to oppose the substitution of the legal representatives of the Estate of the second Defendant for the following reasons:

“(a) The Agreement could only be enforced by the said Zarqa Nadeem Ahmed and/or against in so far as it related to the shares of the deceased second Defendant;

- b. **The 3rd Defendant's misrepresentations in the Deed of Variation dated 20th July, 2013 necessitates rejoinder of Zarqa Nadeem Ahmed into this suit;**
- c. **Clause 5.1 of the Agreement did not limit the damages recoverable from the deceased 2nd Defendant and the 3rd Defendant under the Agreement to Kshs 8,000,000.00. The Clause only provided a guarantee for any such damages in the said sum of Kshs 8,000,000.00 leaving the quantification thereof to a court of law or arbitral tribunal;**
- d. **That part of the Agreement requiring the withdrawal of this suit and Winding Up Cause No.6 of 2011 had not been performed by the time of the death of the deceased 2nd Defendant. The performance thereof if any, could only be pursued after the joinder of Zarqa Nadeem Ahmed to the two (2) suits; and,**
- e. **The Advocates for the deceased 2nd Defendant and 3rd Defendant had indicated their refusal to withdraw Winding Up Cause No. 6 of 2011”.**

8. The Plaintiff filed his written submissions herein on 22nd July 2013. The same opened by giving the background to the Notice of Motion dated 10th May 2013 including the necessity for it and the opposition thereto by the personal representatives of the 2nd Defendant as well as the 3rd Defendant. The Plaintiff submitted that the fact of the death of the 2nd Defendant and who her legal representatives were, was not in dispute. There was also no dispute that this suit had not been withdrawn as at the death of the 2nd Defendant, notwithstanding the provisions of clause 3 (n) of the Agreement. Further, there was also no dispute that the entire clause 3 of the Agreement relating to completion by the deceased 2nd Defendant, had not been fully complied with as regards the estate and the 3rd Defendant herein. The Plaintiff then cited to court the provisions of **Order 24, rule 4 (1) and (2)** of the *Civil Procedure Rules, 2010* which provides as follows:

“24. 4. (1) where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.

(2) any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant”.

9. The Plaintiff went on to say that his claim against the deceased 2nd Defendant was based upon fraud and breach of fiduciary duty. The cause of action as against the 2nd Defendant devolved to her estate. It survived her and continues. It was the Plaintiff's submission that this Court is

mandated as a matter of law to cause the legal representatives of the deceased 2nd Defendant to be parties to this suit so that the same may proceed. He submitted that the two legal representatives could not resist the substitution for any reason whatsoever. The Agreement was never completed in so far as the same related to the deceased 2nd Defendant. The clause therein requiring the withdrawal of this suit had not been performed. It can only be performed after the substitution of the legal representatives of the 2nd Defendant. The Plaintiff also referred this Court to **sections 79 to 95** of the *Law of Succession Act* which underscored the duties of the legal representatives. In his opinion, the Defence of this suit was one of the duties of the legal representatives of the 2nd Defendant just as they were bound to ensure the enforcement and performance of the Agreement. The position with regard to substitution was considered by the Court of Appeal in the case of **Morjoria v Abdalla (1984) KLR 490**. The Plaintiff maintained that such was on all fours with the Plaintiff's Application before this Court.

10. As regards the application to amend the Plaintiff to reflect the substitution, the Plaintiff referred to the provisions of **Order 8 rule 3 (1)** of the *Civil Procedure Rules, 2010*. He noted that the request for amendment is a matter of discretion. The proposed amendments as per the draft Amended Plaintiff annexed to the Application were intended to plead further particulars of loss as against the deceased 2nd Defendant, as well as the 3rd Defendant, which had arisen out of the audit above referred to of the 1st Defendant Company. They also sought specific performance of the Agreement as there was no dispute that the same had not been fully performed. In this regard, the Plaintiff referred this Court to the Court of Appeal's authority being **Central Kenya Ltd v Trust Bank Ltd & 4 Ors Civil Appeal No. 222 of 1998**. At page 4 of that authority, the Court of Appeal opined as follows:

“It is trite law that an appellate court will not lightly interfere with the exercise of a court's discretion unless it is satisfied that the discretion was wrongly exercised or there is an error in principle. It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.11 rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994] 4 All ER 464).

The Plaintiff continued his submissions by emphasising that the entire clause 3 of the Agreement had not been performed as a result of the death of the 2nd Defendant. The said *Winding Up Cause No. 6 of 2011* had not been withdrawn and the advocates for the Defendants had refused to sign the consent therefore. Similarly, this suit had neither been withdrawn nor settled nor compromised as per **Order 35 rule 5 (1)** of the *Civil Procedure Rules, 2010*. The Plaintiff therefore submitted that as settlement and compromise of this suit had not been applied for, nor indeed granted, substitution was necessary for this purpose. There is the intention as per the Agreement to withdraw this suit as well as the Winding Up Cause as aforesaid. However, as the Plaintiff has submitted, this is not to be effected by the parties for the reason that the 2nd Defendant was deceased before the intention was so effected. The reading of clause 5.1 of the Agreement does not support the objection taken by the 3rd Defendant and the legal representatives of the 2nd Defendant. The Plaintiff submitted that on the whole, a proper case for substitution and amendment had been made out. The Defendants had not demonstrated what prejudice or loss they stood to suffer if the Notice of Motion is allowed.

11. What were entitled the 1st and 2nd Defendants' submissions were filed herein on 2nd August 2013. In fact they were filed by the firm of Oraro & Company, Advocates for and on behalf of the said Zarqa Nadeem Ahmed and the 3rd Defendant. Having set out the background to the suit to date and noting that there were several suits between the parties with respect to the affairs of the 1st Defendant, the advocates set out the history of such suits right up to the negotiations leading to the Agreement. The advocates maintained that the material part of the Agreement was as follows:

“a. That the parties withdraw the suits HCCC No. 717 of 2009 Mahendra Pandya vs. Business Forms and Systems Limited & 4 Others and Winding Up Cause No. 6 of 2011 In the Matter of Business Forms and Systems Limited, as stipulated in Clause 3 (n) – a clause that was inserted at the Plaintiff’s insistence, whose lawyer, not unreasonably insisted that *“there must be a complete compromise and settlement of the court cases. It is not expected of the Purchaser to take up shares in respect of which there is a winding-up petition”*. It is important to note that under this provision the consent letters had to be signed by the parties’ advocates and *“copies of such consents duly stamped by the Courts shall be handed over to the Vendors for retention”*. Obviously it was the Purchaser’s obligation to hand over duly stamped consents for retention.

b. With regard to indemnity and further assurance, it was agreed that a sum limited to Kenya Shillings Eight million (Kshs.8,000,000.00) be retained out of the balance of the purchase price for two years to cater for any loss or damage that may arise from and/or pursuant to the provisions of the Agreement or any matter contemplated in that Agreement, as stipulated in Clause 5.1.

c. That the Agreement constitutes the whole agreement between the parties relating to the sale and purchase of shares; and that no party relied on any representation made by any other party which is not a term of the Agreement, as stipulated in Clause 8.1”.

12. It was the Defendants’ submissions that after the 2nd Defendant died on 28th May 2012, the Plaintiff engaged in what could be described as a series of machinations designed not only to receive all the benefits under the Agreement (whilst being relieved of his own obligations) but also to receive further benefits at the expense of the Defendants by seeking the proposed amendments to the Plaint. They maintained that the Plaintiff induced the 3rd Defendant to enter into the said Deed of Variation, which was entirely for the benefit of the Plaintiff, as it not only extended the period in which the payments due from him under the Agreement were to be made, but also purported to transfer a property registered in the name of the first Defendant Company into his own name. The Plaintiff was now accusing the 3rd Defendant of misrepresentation on the basis that the recitals in the Deed of Variation contained the statement that he was the only beneficiary of his mother’s (the 2nd Defendant) estate. It was only after the Deed of Variation was executed that the said firm of Ngwili & Co, accountants and auditors were appointed without the involvement of any of the Defendants or this Court. Not only did the Plaintiff take it upon himself to select those accountants but it was also not clear how they were to carry out the audit of the 1st Defendant only for the period 2007 to 2012. Thus it was no surprise to the Defendants that the said audit revealed that the 2nd and 3rd Defendants had allegedly misappropriated the large sum of Shs. 176,303,060/- from the first Defendant Company. The Defendants submitted that it was against this background that the Application before Court should be evaluated.

13. The Defendants further submitted that as the parties to the Agreement, had reached a comprehensive settlement of the matters in dispute between them, which included a compromise of this suit, as well as the Winding Up proceedings, by their withdrawal with no order as to costs. This Court had no jurisdiction to grant any relief with respect to and/or in relation to this suit. The Defendants referred the Court to the case of Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd (1986) eKLR in which Shields J. had followed and applied the decision in Green v Rozen & Ors (95) 2 All ER 797. Slade J. in that suit had found:

“The court made no order of any kind whatsoever, and, having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement.”

It was the Defendants’ clear submission that as the original cause of action in this suit was superseded by the Agreement, this Court has no jurisdiction to entertain and/or grant any relief either as sought in

the said Application or at all. They went on to say that **Order 25 rule 5** of the *Civil Procedure Rules* is a procedural device for enforcing a compromise between parties. The fact that no application for compromise has been made, does not render the Agreement void or unenforceable nor does it revive the original cause of action.

14. The Defendants continued their submissions by acknowledging that the Agreement had only been part performed by the parties but such did not affect its validity. The legal representatives of the estate of the 2nd Defendant had made it clear that they were bound by the Agreement and intended to honour it, as has the 3rd Defendant. The Plaintiff was actively using these proceedings and his Application before Court to avoid his outstanding obligations under the Agreement while receiving all the shares in the 1st Defendant Company. The estate of the 2nd Defendant, as well as the 3rd Defendant, would be seriously prejudiced if the joinder and the proposed amendments to the Plaintiff were allowed. The shares in the 1st Defendant Company were agreed to be sold to the Plaintiff for Shs. 60 million – a heavily discounted price, so as to bring the acrimonious and emotionally taxing disputes within the family, to an end. The 2nd and 3rd Defendants wanted to move on. The Plaintiff did not. The Defendant submitted that the entire purpose of the Agreement was to draw a line in the sand and for the parties to get on with their lives. The Defendants maintained that what the Plaintiff was doing was essentially litigation blackmail to cover up his efforts to only pay Shs. 20 million for a 66% shareholding in the first Defendant Company. The Defendants concluded that the proposed amendments to the Plaintiff sought, *inter-alia*, to have the 1st Defendant joined as a co-Plaintiff to the suit. Such would not be permissible as no one can be enjoined as a Plaintiff without giving consent. No such consent would be forthcoming. The effect of the Plaintiff's Application would lead to an unravelling of the Agreement with the shares that had been transferred to the Plaintiff's wife as his nominee reverting to the 3rd Defendant. Parties should be held to their bargain and as a result the Defendants prayed for the Plaintiff's Application to be dismissed with costs.

15. It seems to this Court that it would be better to consider the Plaintiff's Application to amend the Plaintiff herein before coming to a decision on whether the legal representatives of the Estate of the 2nd Defendant should be enjoined into this suit. I have perused the proposed Amended Plaintiff annexed to the Supporting Affidavit of the Plaintiff sworn on 10th May 2013. Paragraphs 30 to 38 thereof are completely new as are prayers e., i. and part of j. In my opinion, the effect of adding those paragraphs and prayers completely changes the tenor of the suit to the disadvantage of the estate of the 2nd Defendant and the 3rd Defendant. The principles upon which amendments to pleadings may be made are as set out and stated in the Court of Appeal decision in **Eastern Bakery versus Castelino (1958) EA 461**. The principles were summarised as hereunder:

“1. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.

2. There is no injustice caused to the other side if it can be compensated with costs.

3. The court will not refuse an amendment simply because it introduces a new case.

4. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject of the suit.

5. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.

6. The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.

7. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid

principles”.

16. The Defendants herein have submitted that the proposed amendments to the Plaintiff would seriously and severely prejudice them if allowed. I have little doubt that the Agreement was entered into between the parties with a view to resolving all the differences and disputes which had arisen between them particularly as regards the operations of the 1st Defendant Company. The Agreement, in my opinion, was very much a compromise and a settlement of the various cases between the parties including this suit and *Winding Up Cause No. 6 of 2011* as per clause 3n thereof. I concur with the finding of **Shields J.** in the **Lochab Transport** case (supra) when he surmised:

“The defendant seeks to avoid payments of the sums due under the settlement by setting up a number of defences but I am satisfied that all these defences are based on a radically mistaken conception of the law. When a claim is compromised, the cause of action becomes merged and is superseded by the compromise and a defence to the original cause of action is not a defence to an action brought to enforce the compromise. Thus in the present case, the defendant cannot rely as it has sought to do on the arbitration clause in the policy of insurance to stay the action founded on the compromise.”

Shields J. continued in this vein when he detailed on the second page of his Judgement as follows:

“Can one avoid performing one’s bargain because one has learnt something that one didn’t know when one made the bargain? I think not. It is plain from the correspondence exhibited by both plaintiff and the defendant in the various applications made herein that the matters complained of were discovered by the defendant after investigations instigated by it after it concluded the settlement of the claim with the plaintiff. One asks why didn’t the defendant do this before it had settled the claim with the plaintiff? It does not speak highly of the defendant’s good faith. No reason has been advanced as to why the defendant did not carry out the investigation prior to the settlement of the dispute. One cannot but feel that this late embarked-on investigation connotes a reluctance to pay and nothing else. It does not reflect favourably on the prelicity of the defendant.”

17. I find that a similar situation is reflected here on the part of the Plaintiff herein. I have perused the Agreement and, to my mind, I agree with the Defendants that the document amounts to a determined attempt to resolve the differences between the parties in this suit by allowing the Plaintiff a total buyout of all the shares in the 1st Defendant Company. It may well be that the consideration of Shs. 60 million therefore may be on the low side as has been suggested in the Third Defendant’s Replying Affidavit. However, the document as drawn, is a compromise between the parties. Sacrifices have no doubt had to be made on both sides. In my opinion, I do not consider that the death of the 2nd Defendant should in any way alter the compromise and agreement reached between the parties. Having acquired the whole or the majority of the shareholding in the 1st Defendant Company, the Plaintiff then instigated an audit investigation into the affairs of the same limited to the years 2009 to 2012. It appears that it was in those years that the 2nd and 3rd Defendants were in charge of the affairs of the 1st Defendant Company. As a result of the audit carried out by a firm of accountants/auditors appointed solely by the Plaintiff, anomalies with regard to the finances of the 1st Defendant Company have come to light leading to the Plaintiff seeking an amendment to his Plaintiff which has the effect of prejudicing the compromise reached between the parties.

18. One asks the question why, as in the **Lochab Transporters** case (supra) the Plaintiff did not carry out the investigation prior to the settlement and compromise of the dispute between the parties? As per the words of **Shields J.:**

“One cannot but feel that this late embarked-on investigation connotes a reluctance to pay and nothing else. It does not reflect favourably on the prelicity of the defendant.”

In this case, it does not reflect favourably on the actions of the Plaintiff. Furthermore, the amendments as

sought by the Plaintiff to the Plaintiff in his draft Amended Plaintiff annexed to the Application changes the same into one of a substantially different character and prejudices the existing rights of the Defendants. As a result, I refuse the Plaintiff's Application to amend the Plaintiff herein.

19. That leaves the Plaintiff's prayer in his said Application to enjoin the legal representatives of the estate of the 2nd Defendant to the suit. Initially, in considering the position of the estate, I was of the opinion that it would be as well to join the legal representatives of the same to this action. However, now I am not so sure. My original thoughts were that if enjoined, the legal representatives could come under the umbrella of this suit to seek enforcement of the Agreement. However as the pleadings herein make no reference whatsoever to the Agreement, there would seem to be little point to such enjoiner. Indeed, I am influenced by the decision and finding of **Slade J.** in the case of **Green v Rozen** (supra). At page 801 of that authority the learned Judge stated as follows:

“The court made no order of any kind whatsoever, and, having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement.”

20. In this regard, I consider the Plaintiff's cited authority of **Flex Air Cargo Ltd v Aeronav Ltd (2000) eKLR** as distinguishable. That was a case that involved a Preliminary Objection premised on a notice written by the Plaintiff allegedly withdrawing the suit. The Plaintiff had argued therein that the notice was not adopted or acted upon by the court and was filed in error. In this suit, there was no suggestion that any of the parties had filed a notice discontinuing the suit and it was not an instance as to whether the Court could or should act on a notice of discontinuance. The tenor of the Affidavits herein, both in terms of those of the Plaintiff's as well as the Defendants', is that this suit has been compromised. As stated above, I have no doubt that the Agreement between the parties as aforesaid did compromise this suit. I see no reason why the Agreement should not be enforced particularly with regard to its provisions in relation to the withdrawal of this suit before Court. However, if any of the parties hereto need to seek a remedy as regards a breach of the Agreement then they must seek such remedy by a fresh cause of action in relation thereto.

21. As a result, I see little point in the legal representatives of the estate of the 2nd Defendant being enjoined hereto and consequently, I dismiss the Notice of Motion of the Plaintiff dated 10th May 2013 in its entirety with costs to the 2nd and 3rd Defendants.

DATED and delivered at Nairobi this 10th day December, 2013.

J. B. HAVELOCK

JUDGE