REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 393 of 2003

GALEB GULAM (Suing as the executor of the estate of Sadrudin Shashudin Esmail Nuran).....1ST PLAINTIFF/JUDGMENT CREDITOR

ELDOMART HOLDINGS LIMITED.....2ND PLAINTIFF/JUDGMENT CREDITOR

VERSUS

CYRUS SHAKHALAGA KWAH JIRONGO.....DEFENDANT/JUDGMENT DEBTOR

RULING

1. By his Notice of Motion dated 6th January, 2012, and brought under Sections 1A, 1B, 3A and 62(c) and (e) of the Civil Procedure Act and order 40 rule 1, the Defendant sought various orders. At the hearing of the application Mr. Kabogo, learned Counsel for the Applicant indicated that the only order being sought was Prayer No. 4 which read:-

"That this court be pleased to confirm settlement of this matter by agreement of the parties upon payment of Kshs.22,000,000/- by the judgment debtor to the judgment creditors or directly to court."

2. The grounds upon which the application was grounded are that the parties had engaged in negotiations and agreed between themselves that the matter be settled amicably on payment of Kshs.22million in full and final settlement of the matter, that although the Defendant had offered to pay the same, the plaintiffs had refused to accept eh same and reneged on the agreement, that the intention of the Plaintiffs was mala fide intent on humiliating the Defendant through publicized attachments. Mr. Jirongo swore an Affidavit in support of the application and narrated how his advocates had negotiated a settlement with the Plaintiff's Advocates of Kshs.22million. he produced an Affidavit sworn by Steve Luseno on 11th November, 2011 allegedly as evidence of acceptance of the offer to settle the matter at Kshs.22M by the 2nd Defendant, that instead the Plaintiffs had then instructed the auctioneers to recover Kshs.77,375,728/-, that his property has previously been sold by consent of the par ties but that there was an alleged deficit.

3. Mr. Luseno, learned Counsel for the Plaintiffs opposed the application by filing an Affidavit in response. He told the court that previously the Plaintiffs were represented by two different law firms. Shiraz Majan Advocates for 1st Plaintiff and Majanja Luseno & Company Advocates for the 2nd Defendants. He referred the court to the correspondent exchanged and submitted that there was no evidence that there had been any agreement or accord and satisfaction that from the email dated 5th January, 2012 from the Defendant's Advocates, it was clear there was no consensus between the parties,

he urged that the application be dismissed.

4. I have considered the Affidavits on record and Counsels submissions. Accord and satisfaction was defined in the English case of **British Russia Gazette and Trade Outlook Ltd –vs- Associated Newspapers Ltd (1933) 2** K.B wherein at page 643, Scrutton LJ stated:-

"Accord and satisfaction is the purchase of a release from an obligation where arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which, the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."

In **James Wallace property Ltd –vs- William Cable Ltd (1980) 2 NZLR 187** the Newzealand Court of Appeal held:-

"In that it involves the acceptance of something less than the carrying out of the contract itself, accord and satisfaction differs from a discharge by the performance. It is a new agreement under which the party in default is relieved from his former liability by a promise to do something other than what he was obliged to do by the former contract. It is the essence of an accord that there must be an agreement. Whether or not there is an agreement is a question of fact, not law, to be determined from the circumstances of each case." (*Emphasis supplied*)

5. In the case of **James Njuguna Wainaina & Anor –vs- East African Building Society HCCC No. 787 of 2003 (UR)** after analyzing various authorities on the subject in Newzealand and American Jurisdiction I held:-

"From the foregoing authorities, the principles that come out clearly are that for there to be accord and satisfaction there must be a dispute as to the amount due, the amount due must exceed the amount tendered by the debtor, the debtor must indicate at the time of such tender that the sum is being tendered in full settlement of the debt, the creditor must accept such tender by receiving the amount tendered by either negotiating the instrument of such tender encashing the cheque or any other mode of acceptance of such tender.

From case law, it would seem that once the foregoing is proved, the American Courts would accept that there has been accord and satisfaction. However, in Newzealand, the courts there impose the condition that the debtor must show that there has been a meeting of the minds …."

6. Has there been accord and satisfaction in this case? Judgment in this case was entered by consent on 29th January, 2005 for Kshs.45,843,750/-. By agreement, some property at Mombasa owned by the Defendant was sold to recover the decretal sum. It would seem that the amount realized did not satisfy the decree. Several attempts to execute against the Defendant seems to have been undertaken. Sometimes in 2011, the parties attempted some negotiations and several correspondence was exchanged which the Defendant contends forms the basis for accord and satisfaction.

7. The first letter was by the Defendant's Advocates dated 23rd March, 2011 in which they proposed negotiations. By the next letter on record is by the firm of Majanja Luseno & Company dated 27th April, 2011 in which they replied to a letter dated 5th April, 2011 by the Plaintiff's Advocates and which was not produced by any of the parties, inter alia, as follows:-

"The 2nd Defendant does not accept the offer contained in your letter dated 5th April, 2011.

Our client shall consider a sum of Kshs.35,000,000/- all inclusive, a sum that was orally communicated ……."

It would seem that the letter dated 5th April, 2011 by the Defendant's Advocates is the one which contained the offer to settle the matter at Kshs.22million. This is so because, by a letter dated 26th April,

2011, Shiraz Magan Advocates then acting for the 1st Plaintiff replied to the Defendant's Advocates accepting the offer contained in that letter and requested that the sum of Kshs.22 million be remitted by RTGS to his client's account. Replying to these two (2) letters by the Plaintiff's Advocates, Ms Alex Karanja and Co. Advocates for the Defendant wrote on 4th May, 2011:-

"I refer to your letters dated 26th and 27th April, respectively over the matter under reference. <u>It is evident that we are yet to achieve consensus on the settlement of the matter</u>.

……we thus invite your suggestions on the way forward. On our part we propose that at the earliest convenience to all parties, we hold a joint meeting to iron out the issues." (Emphasis supplied)

8. Then there is an email dated 5th January, 2012 by the Defendant's Advocate to the Plaintiff's Advocates which requested a confirmation for a settlement at Kshs.25,000,000/- **"…… in full and final settlement of the subject matter to enable me take instructions on availability of the money from my client."**

9. From the foregoing, I accept the Defendant's contention that clearly there were negotiations. That an offer was made in writing to settle the amount at Kshs.22 million on 5th April, 2011. That offer was accepted by the then Advocate for the 1st Plaintiff on 26th April, 2011 but rejected by the 2nd Plaintiff. The Defendant's Advocates themselves admitted in their letter of 4th May, 2011 that there was no consensus in the matter and suggested a joint meeting to iron out the issues then outstanding. Finally, there is the email of 5th January, 2011 wherein the Defendant's Advocates are asking for a confirmation to settle at Kshs.25million. My view is that, at no time was there any meeting of the minds to settle the claim herein at Kshs.22 million as is contended by the Defendant.

The judgment herein is in favour of the two Plaintiffs jointly. It cannot be severed. If the 1st Plaintiff accepted the offer, the 2nd Plaintiff did not. In any event, the payment of the Kshs.22million was made sometimes in January, 2012 vide a court order. Accord and satisfaction presupposes the tendering of the amount being offered and the same being accepted by the creditor. That is not the case here.

10. I am afraid that the circumstances herein do not show any agreement on the part of the parties. Accordingly, I decline to grant prayer 4 of the Defendant's application dated 6th January, 2012. The same is hereby dismissed with costs.

DATED and delivered at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE