REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 876 OF 2004

ORBIT CHEMICAL INDUSTRIES LTD.....PLAINTIFF

VERSUS

THE HON. ATTORNEY –GENERAL.....DEFENDANT

RULING

The plaintiff orbit Chemical Industries limited moved to the seat of justice filing a suit against the defendant, the Attorney General. The plaint is dated 11th day of August, 2004 and filed the same date. The salient features of the plaint are as follows:-

(i) The plaintiff is the registered owner of all that piece of land situate in the city of Nairobi (Embakasi) in Nairobi Area of the said Republic containing by measurement 38.54 hectares (92.2 acres) or there about known as number 1.R 32622/1 and issued under the provisions of the Registration of Titles Act.

(ii) On or about the 28th day of September,1987 the Registrar of Titles registered a caveat against the said title claiming interest in the land under section 65 of the registration of the titles Act. The caveat was registered as 1.I 32622/3.

(iii) The source of grievance which compelled the plaintiff to move to court and seek the courts' intervention is that the plaintiff contends that the Registrar had no power to register a caveat against the said Title under section 65 (a) (b) (h) (i) and (j).

(iv) That by reason of the afore said unlawful registration of the said caveat against the plaintiffs suit land, the said caveat prohibited all and any dealings with the land absolutely.

(v) That by reason of the actions complained of in number (iv) above, the defendants caused the said plaintiffs land to remain un occupied and was thereafter invaded by squatters.

(vi) By reason of matters complained of in number (v) above the plaintiff on numerous occasions requested the defendant to either remove the squartres or purchase the land from the plaintiff without success.

(vii) Continues to aver that the presence of squatters on L.R. No. 12425 is a natural and foreseeable consequence of the caveat absolutely prohibiting the plaintiff from dealing with the land and in consequence thereof the defendant should be held liable in law for the loss of user, income, mesne profits and possession of the plaintiff's property.

(viii) The plaintiff further contends that on the 14th day of January, 2000 the commissioner of lands on behalf of the defendants' admitted vide a letter of that date to the effect that there was no reasonable ground for the Registrar to register the said caveat against the plaintiff's suit land.

(ix) By reason of what has been stated in number (viii) above the plaintiff contends that the Registrar of Titles did not specify what had been violated under section 65 of the Registration of Titles Act and for this reason the registration of the said caveat against the plaintiffs Title was not only unreasonable but null and void for reasons of being vague, indefinite and with no particulars.

(x) The plaintiff continues to aver that there was no fraud, improper dealing, error or misdescription in the plaintiff's acquisition of land Title number LR. NO. 12425.

(xi) The plaintiff has been unable to have the said offending caveat deregistered because the file relating to LR. No. 12425 has been missing at the Registry office over along period of time.

(xii) Avers further that the Registrars' action complained of were for the wrong reasons , improper purpose and in excess of the functions conferred upon him by virtue of the provisions of section 65 of the Registration of Titles Act.

(xiii) By reason of the said wrongful registration of the caveat against the plaintiffs property and in the process thereby preventing the plaintiff from entering and dealing with the developing or taking any action in respect thereon, it is the stand of the plaintiff that the said action of the defendant in registering a caveat against the plaintiffs' property and preventing the plaintiff from using the same amounts to the defendants taking and or expropriating the plaintiffs' proprietary rights over LR. No. 12425 on the one hand. On the other hand it amounted to a trespass to land without any compensation contrary to section 75 of the Kenyan constitution and contrary to the lands compulsory acquisition Act cap 295 of the laws of Kenya. In the process the plaintiff's efforts to have access and have possession of the suit property were frustrated.

(xiv) Further contended that the defendants actions vide gazette notices No.119 of 8th May,1987 and 65 of 5th June,1998 are null and void in so far as they purport to have a retrospective effective.

In consequence thereof the plaintiff sought from the defendants:-

(a) A declaration that the Registrar of lands had no right in law to enter and register a caveat over L.R. No.12425 And that the Registrar's conduct in entering and registering a caveat over LR. No. 12425 was null and void and was a taking of private property without following the laid down procedures and without compensation contrary to section 75 of the Kenyan constitution and land acquisition Act cap 295 laws of Kenya.

(b) loss of income rent and or mesne profits at the rate of Kshs.3,489,550 per month from the date of the registration of caveat until the date of its removal.

(c) General damages for Trespass over L.R. no. 12425.

(d) Removal of the caveat and squatters from L.R. No. 12425 and delivery of vacant possession of LR. No. 12425 to the plaintiff.

(e)Interest on prayers (b) and (c) above.

(f) Costs

(g) Such further or other relief as this Honourable court may deem just.

The plaint was subsequently amended at paragraph 4 to read the 28th day of September, 1987 instead of

1998.

The defendants had filed a defence against the afore stated plaintiffs claim dated 23rd day of May, 2005 and filed the same date. For purposes of the record only the salient features of the same had been that:-

(i) The defendant conceded that a caveat had been registered against the said land; denied causing squatters to invade and occupy the suit premises in issue; denied contents of paragraphs 4,5,6,7,8,9,10,16,18,19,23 and put the plaintiff to strict proof; asserted; that plaintiff had all along been in occupation and control of the suit premises and the defendants had never interfered with the plaintiff's possession of the suit premises and it was solely incumbent upon the plaintiff to take firm control and possession of its premises in a manner that would have prohibited squatters from invading and settling thereon; that the defendant takes issue with the fact that the trespassers have not been joined to the proceedings; paragraphs 12, 13 and 15 were argumentative while paragraph 18 was scandalous, frivolous and they should be struck out; denied the plaintiffs assertion that the registration of the caveat over the subject premises was null and void or that it amounted to the taking of private property. In the alternative that the current occupants of the premises alleged by the plaintiff to be squatters are liable for the loses, rents or mesne profits and trespass mentioned; that the plaintiff had not complied with the provisions of the land control Act chapter 302 of the laws of Kenya; and lastly that the registration of the caveat was proper as the same was in accordance with section 65(i) (f) of the Registration of Titles Act and was finally removed after legal notice 6540 of 5th June, 1998 was published which notice had the effect of exempting the land from the provisions of the land control Act.

The plaintiff there after presented an application by way of chamber summons dated the 10th day of June, 2005 and filed on the 13th day of June, 2005. It had been presented under section 3A of the CPA cap 21 order VI rules 13(1) (1) (c) and (d) and 16 of the CPR as it then was . Among others the reliefs sought was a prayer that: "**That the defendants defence to the plaintiffs claim be and is hereby struck out**" The said application was defended and parties were heard on its own merits and it gave rise to a ruling delivered by Ojwang J as he then was now Judge of the Supreme Court, dated and delivered at Nairobi on the 22nd day of September, 2006. For purposes of the record too the following orders were made by the said learned Judge:-

(1) The defendants' statement of defence dated 23rd May, 2005 is hereby struck out.

(2) Judgment is entered for the plaintiff in the terms of the prayers set out on page 4 of the amended plaint of 11th October, 2004.

(3) The plaintiff shall have this matter set down for formal proof and a date shall be given on the basis of priority before a Judge in the civil division of the high court.

(4) Any such application as may arise from this ruling and any such motion as may relate to the cause herein shall be heard and determined before a judge of the civil division of the high court.

(5) The plaintiffs costs in this application shall be borne by the defendant.

A perusal of the hand draft proceedings on the record reveals that the matter was fixed for hearing by way of formal proof but it was adjourned severally. On 14/6/2007 the court was informed that the defendants were seeking instruction from their client the commissioner of lands with a view to settling the matter. The court was informed that there was a possible settlement and for this reason the court adjourned the matter severally but no compromise was reached. On 20/9/2007 the court was informed that no settlement had been reached and for this reason the parties required time to sort out the issue of documents to tender as exhibits have these exchanged before a trial could commence. On 24/10/2007 the court was informed that the plaintiffs audit report had been submitted to the defendants who had in turn submitted the same to their expert for a professional opinion with a view to securing a settlement. The matter was adjourned severally to get a feed back on the report with a view to reaching a settlement.

The failure to reach a settlement prompted the filing of the application subject of this ruling. It is dated the 23rd day of July, 2008 and filed on the 24th day of July, 2008. It is brought under order XXIV rule 6 and order 1 rule 1 of the civil producer Rules section 3A of the civil procedure Act cap 21 laws of Kenya and all other enabling provisions of the law. The reliefs sought are as follows:-

(1) Spent

(2) That the plaintiff/Applicants' Formal Proof Application be marked as wholly adjusted or settled in terms of the compromise Agreement reached between the parties on the 4th March, 2008 and evidenced by the compromise Report prepared by the defendant/Respondent on the 4th March, 2008.

(3) That in terms of the said Agreement, Judgment be and is hereby entered against the defendant/Respondent in the sum of Kenya shillings six billion, fifteen million one hundred and thirteen thousand(Kshs.6,015,113,000.00) net of tax together with further interest on the same at the rate of fourteen percent(14%) per annum from the 4th March,2008, until payment in full.

(4) That the defendant/Respondent do pay to the plaintiff/Applicant the costs of the suit as shall be agreed between the parties failing which the same should be taxed by the Deputy Registrar .

(5) That the Defendant/Respondent do pay to the plaintiff/Applicant the total decretal amount including the costs together with further interests on the same at the rate of 14% per annum until payment in full within thirty (30) days from the date hereof and in default the plaintiff/applicant be at liberty to proceed with execution forthwith.

(6) That there be liberty to apply.

(7) That the costs of this application be provided for"

The grounds in support are set out in the body of the applications and in a summary these are that a compromise has been reached between the disputants with regard to the amount payable to the plaintiff for loss of income and for this reason no further issue remains for determination by this court after the said compromise is recorded. For the reasons given there is no justification for calling upon the parties to tender evidence before disposal. The courts is invited to note that the dispute over the suit land had been pending since 1987 a period of over 21 years as at the time of the presentation of the application subject of this ruling and for this reason the court is invited to take note of this and then order the matter to be heard and disposed off by way of the application subject of this ruling. The plaintiff contends that the conduct of the defendants demonstrates that the defendants are avoiding to have the case concluded to the detriment of the plaintiff hence the need for the court to determine this matter by way of the application presented.

There is also in place a supporting affidavit deponed and simultaneously filed with the application. In a summary the salient features of the same are as follows:-

(i) The deponement is one Ashock Velji Chandaria a Director of Solvents (K) Limited which had allegedly been duly authorized by the plaintiff to have conduct of all matters relating to LR. 12425 the subject matter in these proceedings and the deponent is also conversant with matters subject herein.

(ii) The plaintiffs claim is as set out in the original plaint and as subsequently amended to which the defendants made a move to defend which defence was struck out by orders of this court made on the 22nd September, 2006 whose orders among others granted the plaintiff the right to a formal proof which was ordered to be disposed off on a priority basis.

(iii) The deponent has knowledge that the matter was indeed set down for hearing by way of formal proof but this did not take off because the deponent was away oversees on account of sickness, the

defendant wanted to seek leave to appeal to the court of appeal against the decision to strike out the defence; the defendants informed the court that they were willing to settle the matter and they needed time to settle the matter. The defendant's assurance of an offer to settle led to the matter being adjourned severally.

(iv) In pursuant to the defendants expressing a wish to have the matter settled out of court the plaintiffs' advocates duly quantified the plaintiffs claim and submitted it to the defendants for approval which was acknowledged by the defendants.

(v) That the application to seek leave to appeal out of time as against the decision to strike out the defendants defence was withdrawn paving the way for the high court to be firmly seized of the matter herein. Whereupon parties were enjoined to file their list of documents and have the said documents exchanged where upon the defendants intimated to the plaintiffs advocates that they were willing to resume negotiations with a view to settlement. Where upon the matter was adjourned severally once again to enable the defendants obtain an expert opinion from the treasury on the plaintiffs quantification of the claim contained in a report submitted by the plaintiff.

(vi) That the defendants after going over the plaintiffs quantification quantified the plaintiffs claims to be Kshs.851,424,000.00 which information was passed on to the plaintiffs advocates and the court with a caveat that the defendants needed to fine tune their own expert report as there were a few clauses to fill up. Negotiations and exchanges continued until the plaintiffs counsel fixed the matter for hearing on the 17th, 18th, and 19th March, 2008.

(vii) Upon fixing the case for hearing the defendants counsel wrote to the plaintiffs counsel on the 27th day of February, 2008 informing him that there are two reports namely the Evaluation of the opinion of Mr. Jotham Munda & Property Wise Kenya Limited and a Mr. J.P.G Tuamwari, the head of Centrol planning Unit Ministry of Finance and Planning which were to be harmonized by the two experts with regard to the varying computations of the valuations.

(viii) That the deponent has knowledge from his advocates on record that the deliberations over the two experts reports were participated in by the plaintiffs advocates resulted in a compromise being reached in the sum of Kshs.6, 015,113,000.00 as the quantity of the damages payable to the plaintiff by the defendants and a Mr. J.P.G. Tuamwari the chief Economist Ministry of Finance was mandated to prepare the compromise report which was to be tabled in court and form part of the settlement. That it is on record that the advocate for the defendant attended court severally seeking adjournments with a view to recording a settlement and when they failed to do so is when the plaintiff's advocates fixed the application for hearing and disposal.

(ix) By reason of what has been stated above, it is the applicants assertion that they have presented to court sufficient material to warrant them being granted the reliefs sought and the court is so urged to bring this long standing litigation to a close by granting the reliefs sought.

The respondent filed a replying affidavit. The earliest came from a Mr. C.K. Ngetich deponed on the 8th day of September, 2008 and filed on the 9th day of September, 2008. The salient features of the same are as that the deponent is a land Registrar within the ministry of lands which is the instructing client; the deponent is aware that the plaintiff seeks an entry of Judgment allegedly on a compromise reached by the parties on 4/3/2008; denied knowledge of the Ministry of land accepting to settle this matter in the sum of Kshs.6,015,113,000.00; that he has information from the state counsel who was then appearing for the Ministry in this matter that indeed the move to want to have the matter in dispute herein settled had been initiated by a state counsel in the defendants office who was then appearing for the defendants where by the plaintiffs made a proposal to have the matter settled at a colossal sum of Kshs.18,801,206,400, arising from an alleged loss of income worked out in a report which had been prepared for the plaintiff; concedes that the Ministry upon receiving the plaintiffs report handed it to a Mr. J.P.G. Tuamwari an economist at the Treasury to analyze the said report with a view to arriving at an appropriate amount payable on quantum which he did by arriving at a figure of Kshs.424,000.00 as appropriate compensation; that it is conceded that it was greed between the parties that since the two reports were very much at variance the

two experts should meet together and iron out their difference. The said meeting duly took place and culminated in another opinion by the said Mr.J.P.G. Tuamwari that the quantum be Kshs.6,015,113,000.00 which was rejected by the Ministry and in the process brought the issue of settling the matter out of court to an end; that the newly suggested amount with a view to it forming the basis for a settlement was rejected by the Ministry because the amount had been inflated and thereafter parties fixed the matter for hearing by way of formal proof and it is therefore an after thought on the part of the plaintiff to fix the application for enforcing the alleged compromise; that the provisions under which the plaintiff is seeking relief can only apply where there is either an oral or written compromise to be recorded by the court. It does not apply here because what is being relied upon is a mere opinion. Further that the advocate's ostensible authority is not absolute and this can only arise where a Judgment has been entered so that it is used as a shield by the party in whose favour the Judgment has been entered. It can never be used as a shield to enforce a disputed claim. Further it has to be exercised in accordance with the clients' instruction.

The above replying affidavit by Mr. Ngetich was followed by the filing of two further affidavits. The first one is that one deponed by one Joseph Kanja Kinyua deponed on the 22nd day of September, 2008 and filed on the 23rd day of September, 2008. The salient features of the same are that:-

(i) The deponent is a Permanent Secretary in the Ministry of Finance and the chief custodian of public Funds who was conversant with the plaintiffs claim; concedes that the has knowledge that Mr. J.P.G. Tuamwari who was the chief economist at the Ministry of Finance was requested by the Hon. the Attorney General to prepare an expert opinion on the plaintiffs claim and then present it to the treasury for approval or directions; the said chief Economist had initially come up with an opinion of the amount payable being Kshs.851,424,000.00 but did not present it to the deponents office upon a revisit to the matter jointly with the plaintiffs representatives the same chief economist came up with a figure of Kshs.6,015,113,000.00 (Six billion fisteen million one hundred and thirteen thousands) because the figure was highly inflated which the Ministry of Finance had not agreed to settle; that Mr. J.P.G. Tuamwari is not an authorized officer in terms of section 8(i) of the government contracts Act and hence cannot bind the government; that the alleged settlement of the matter in the stated sum is illegal un supported by any economic data or basis and would cripple the affairs of the Ministry of lands whose estimated recurrent expenditure is Kshs.1,440,761,140.00 and development expenditure of Kshs.754,375,000.00 which is far much lower than the amount being sought.

The second further affidavit come from one Ms Dorothy Angote deponed on the 23rd day of September, 2008 and filed the same date. The salient features of the same are that

(i) The deponent is the Permanent Secretary in the Ministry of Lands and was conversant with matters in issue; to her knowledge Mr. J.P.G. Tuamwari never consulted the Ministry of lands over the plaintiffs claim Neither has the Ministry of Finance ever agreed to settle the claim in the sum of Kshs.6,015,113,000.00 or nay other sum or at all; that the Ministry of Lands has always instructed the Attorney General to defend the claims; the claim of Mr.Tuamwari needed to be presented to the Permanent Secretary Ministry of lands and Permanent Secretary Ministry of Finance for approval but was not so presented; that under section 8(i) of the government contracts Act cap 25 laws of Kenya the only officer authorized to bind the government are the permanent secretary, Deputy Permanent Secretary to the Treasury or a person or persons specifically of generally authorized by either of them in writing in that belief. On this account Mr. J.P.G. Tuamwari an Economist of job Group R is not such an authorized officer and lastly confirmed estimates of the Ministry of lands and for this reason it can not accommodate the amount forming the alleged compromise.

In response to the respondents replying deponements, the plaintiff/applicant filed a further affidavit deponed by the same deponent. Ashock Velji Chandaria on the 26th day of September, 2008 and filed on the same day of the 26th day of September, 2008. The salient features of the same are that he still reiterates that the denial of the defendants not withstanding there is a compromise reached between the defendants' expert and the plaintiffs counsel dated 4th day of March,2008; that it is the defendant which initiated negotiations for a settlement which culminated in the compromise of 4th March, 2008 wherein

the plaintiff/applicants claim was settled in the sum of Kshs.6, 015,113,000.00.; reiterates that the compromise was reached at a meeting between the plaintiff/applicant Advocates on record and its actuarial expert and the defendant/Respondents advocate and their expert Mr.J.P.G. Tuamwari the chief government Economist at the Attorney General office which agreement was subsequently prepared and signed by the said expert as mandated by the parties that there is absolutely no evidence that the Ministry rejected the compromise agreement and/or that thereafter terminated the settlement discussion evidenced by the fact that the defendants' counsel then on record participated in the taking of dates for mention to record a settlement and lastly stating to court that the matter was now in the hands of their pay masters but never alleged that the defendants Respondent had not accepted the compromise. To the applicant, the defendant/Respondents' conduct is nothing but an attempt to arbitrarily withdrawn from the compromise. The court is invited to find this as an afterthought and find that the compromise was properly reached and enforce the same.

They deny the defendant/Respondents allegation that the amount of the quantum was inflated as the same was based on documents tendered by them which were scrutinized by the expert leading to both sides coming to a consensus with regard to the quantum reached based on sound legal principle and data availed and it is the kind of settlement envisaged by order XXIV rule 6 of the CPR. By reason of this the plaintiff is entitled to request the court to enter judgment in its favour as the defendant is arbitrarily trying to withdraw from it. They confirm the deponement of one Mr. Joseph Kanja Kinyua that indeed Mr. J.P.C. Tuamwari was instructed by the defendant/Respondents own counsel to prepare an expert opinion on the claim on which a settlement could be based; that the defendant having held out Mr. J.P.G. Tuamwari as their own expert witness they cannot be allowed to allege that the said expert had acted distinctly from the Defendant/Respondent or its counsel as he was held out as the defendants own expert as admitted in the affidavit of Mr. Ngetich. They contend that the compromise having been entered into by the duly appointed representatives of the parties who were acting in accordance with their clients express instructions in binding on the parties and the court is invited to hold that it wholly adjusted the suit and what is left is for the court to enter Judgment in terms of the compromise. They maintain the Defendant/Respondents advocate had both ostensible and implied authority to conduct all matters incidental in to the suit including entering into negations and the reaching of the compromise because nowhere has the Defendant/Respondent intimated to the court that he brought to the attention of the court or the opposite party instructions which went a long way to negate or limit the authority of the advocate with regard to the settlement arrived at. This is further confirmed by the fact that at no time had the defendant/Respondent claimed that, its instructions (A.G.) to its counsel had limitation. Likewise neither has the counsel and the expert witness claimed that their instructions to negotiate a compromise were limited an assertion confirmed by the fact that no evidence has been tabled by the defence to prove existence of any such limitation.

Contends that Mr. Tuamwari was acting as an agent of the government and therefore binds the government unless if there is proof that it had been incorporated in the terms of the negotiations that Tuamwari was not acting as a government official. The court is invited to hold that the said Tuamwari was acting as such in the absence of evidence to show that limitation had been placed on the conduct of his business as a government official. More so when the defence has admitted that his counsel had authority to call in their expert to iron out the discrepancies in the computation. By reason of what has been stated above the compromise is binding on the defendant considering that there has been no allegation of fraud, collusion, duress, mistake as vitiating matters. If any procedures and or policies were flaunted by any of the officials of the government with regard to the plaintiffs claim herein, that should not be visited on an innocent party the plaintiff who was a 3rd party. The defendant/Respondent was aware of all the on goings at every stage of the negotiations, which negotiations were supported by the defendants the amount reached for the compromise is proper, considering that the defendant was in agreement that the plaintiff was entitled to the loss for the economic use and the period it would have put to use its land LR. No.12425 had it not been for the Defendant /Respondents' action in registering an illegal caveat and keeping the same over the said property for a period of twenty one (21) years.

The plaintiff further agreed to a reduced claim on the basis of a promise of immediate settlement and also agreed to a mitigation of Kshs.2 billion infavour of the defendant/Respondent which is sufficient consideration. That since the Defendant/Respondent has admitted that it had goes on instructed the

Attorney General to defend the claim, it is on the basis of that instruction that the defendants/Respondents counsel in consultation with its client that the counsel called for a final meeting on the 4th day of March, 2008 to settle the case and proceeded to invite the experts from both sides to the said meeting. It is the stand of the plaintiff that to date there is no evidence that the defendant/Respondent has repudiated the Attorney Generals actions or obtained any affidavit or evidence from the learned counsel concerned to confirm that there was no authority to engage in the said negotiations and reach the compromise reached. For this reason the court is invited to make a finding that no such limitation was placed on the said counsel.

Lastly the plaintiff still maintains that the Attorney general with the consultation of their instructing client instructed the chief Economist Mr. Tuamwari to participate and had him held out as their duly appointed agent and for this reason they cannot be allowed to claim limitation of authority to the said agent more so when they have not claimed the same limitation with regard to the counsel appearing on their behalf; that throughout the negotiation for settlement the defendant/Respondents' counsel maintained throughout that he was in close consultation with their client; that issues of application of section 8(1) of the government contracts Act cap 25 do not rise herein as what the parties were dealing with was an issue of settling a court case and not entering into a government contract; that they dispute the defendants' allegation that payment of the sum awarded for settlement will cripple the affairs of the Ministry of Lands, because the defendant has an alternative of having the debt charged on the consolidated fund or alternatively have it specifically budgeted for as a debt owed by the government. There is also no evidence that the defendant cannot settle the said debt otherwise than by charging it on the Ministry of lands Budgetary allocation.

There is reliance placed on annetures annexed by parties to their deponements. Starting with those of the plaintiff. There is a letter dated 22nd October, 2004 confirming that the equitable interests in HCCC No.146/99 Orbit Chemical Industries Limited versus national bank of Kenya as well as LR.12425, LR.32622/1 were assigned to solvents (Kenya) Limited amended plaint in 876/2004, defendants defence filed on 23/5/2005, plaintiffs application for striking out the defence filed on 13th June, 2005, ruling delivered by Ojwang J as he then was now Judge of the Supreme Court with regard to the application for striking out annexed as annexture 2-6 already assessed. There is also documentation on the application Misc. Application No. Nai 314 of 2006 which was meant to seek leave to appeal against the ruling which struck out the defendants defence herein. Annexture 8, a letter dated the 9th day of July, 2007 emanating from the plaintiffs counsel to the defendants' counsel inviting them to attend court for a mention with a view to recording a settlement; annexture 9 dated 18th day of July, 2007 from the defendants counsel to the plaintiffs counsel asking the plaintiffs counsel to provide their proposal, for a settlement; annexture 10 being the plaintiffs quantification of the plaintiffs' claim. The annexture comprises extracts of principles of law on quantification, feasibility study report by one Jotham Omunda, May 1987, observations on proposed development on plot No. LR.12425-Embakassi by one Philip Kungu Architect to the plaintiff dated 23rd July, 1987, report and valuation of the suit property by property wise Kenya limited prepared by one Margaret Waithaka dated 15th March, 2007, final report on the amount of income lost by Orbit Chemical Industries Limited dated 25th June,2007 by Leslie Okudo Akumo consulting Actuary. Annexture 15 being the order in Nairobi Misc Application Nai. 314 of 2006 between the Attorney General as the applicant and Orbit Chemical Industries Limited dated the 25th day of September, 2007 whereby the application to seek leave to appeal out of time against the ruling striking out the defendants defence. Annexture 16 is a communication dated 4th October, 2007 from the plaintiffs advocate to the defendant's advocates asking them to comply with the order on the filing of a list of document. Annexture 17 is the Evaluation of the opinion of Mr. Jotham O. Munda dated May 1987 and property wife Kenya Limited dated March, 2007. There is indication that the valuation was being done by one Mr. J.P.G. Tuamwari being head centrol planning unit in the Ministry of Finance and planning November, 2007 which had culminated in quantification of Kshs.851, 424,000.00. Annexture 18 emanating from the defendants to the plaintiffs advocates suggesting that since the two quantifications are at variance the two experts should have a joint consultation to harmonize the difference in the said reports. It is dated 27th day of February, 2008 and gave possible dates for the said meetings. Annexture 20 is the opinion of one J.P.G. Tuamwari after marrying the two varying opinionis and arriving at the net quantification for the amount of loss to the plaintiff of Kshs.6, 015,113,000.00. Annexture 21 and 22 on the other hand are medical documents for one Mr. Ashock Chandaria which were relevant for purposes of seeking

adjournments lastly annexture 23 are court proceedings on the sequence of events leading to the presentation of the application to enforce the compromise already assessed herein.

As for the defence there is annexture DA1 and JKK1 which are similar in content which are extracts of 2008/2009 Estimates of recurrent expenditure for the Ministry of Lands and Indicating the amount deponed as the amount which had been voted for the said Ministry in that year.

Parties also filed skeleton arguments. Three sets were filed for the plaintiff. The first set is dated the 16th day of September, 2009 and filed on the 17th day of September, 2009. A perusal reveals that the following points have been stressed namely:-

That Judgment was entered by the court granting the plaintiff leave to formally prove his claim on 22nd day of September, 2006; the matter was indeed fixed for formal proof but then it was adjourned severally for various reason; there after the defendants counsel asked the leave of court to grant an adjournment to enable learned counsel for the defendant seek instructions from the defendant in order to settle the claim; on that account the defence asked the plaintiffs counsel to give an initiation on the documentation in support of the plaintiffs claim which the plaintiffs' counsel quantified at Kshs.15,063,898,000.00. In the meantime the plaintiffs filed their list of documents in readiness for the formal proof in case the negotiations did not fall through. The defendants indeed forwarded the documentation received from the plaintiffs to their expert who filed a quantification of Kshs.851,451,424,000.00 which was contrary to the quantification that had been given by the plaintiffs expert. This variance quantification necessitated the defendants asking that the two experts do meet and iron out the discrepancy in the quantifications which the plaintiff accdeded to. The plaintiff submits that representatives of both sides met on the 4th day of March, 2008 to harmaonize the quantification. The defendants were represented by Mr. J.P.G Tuamwari, the defendants expert from the Ministry of Fiance and Mr.Anthony Ombwayo Senior Principal state counsel representing the Attorney General. Whereas the plaintiff was represented by a Mr. Leslie Okudo actuarial expert and Mathew Oseko the plaintiffs lawyer. It is the contention of the plaintiff that indeed a compromise was reached of Kshs.8, 020,593,000.00. The state asked for a mitigation of Kshs.2,005,480,000.00 which the plaintiffs representative acceded to leaving a balance of Kshs.6,015,113,000.00 as the quantified loss occasioned to the plaintiffs by the defendants. There after the defendants represented to the court that indeed a settlement had been reached and there remained only a few things left to be ironed out and that the matter was now in the hands of the pay masters.

While revisiting the facts in support of the application, learned counsel for the plaintiff reiterated that annexture 20 is proof that a compromise was reached and handed to the plaintiff; that there is no evidence that the same was rejected by the defendant; that both counsel and the expert had been properly mandated by the defendants to enter into the negotiations with a view to reaching an agreement on quantum which was duly arrived at. It is further the plaintiffs assertion on the facts that the correctness of the compromise reached is signified by the fact that no affidavit has been sourced by the defendants from the counsel who was appearing for the defendant and the expert to controvert the plaintiffs assertion that indeed a compromise had been reached. The defendants cannot escape liability because it is their action of registering a caveat on the plaintiffs land committed way back in the year 1987 which occasioned loss and damage to the plaintiffs. By reason of this the squatters are still on the land and the defendants despite being ordered by the court to evict them in HCCC No.784/96 and herein they have not done so.

Turning to the defendants deponements, the plaintiffs counsel contended that these do not hold because there is admission that it is the defendants counsel who made the first move to inform the court that the defendant was desirous of settling the matter; they duly commissioned an expert to look at the plaintiffs quantification; they expressed a desire to harmonize the two computations from the opposite side with a view to settling the claim; the revisit on the two computations gave rise to the final figure arrived at; there is nothing to show that the computation arrived at had been rejected by the government. The plaintiff further contends that they were entitled to present the application subject of this ruling to seek entry of judgment as per the compromise reached. Still maintains that both the expert and the counsel appearing for the defendants had both ostensible and implied authority to bind the defendants in their transactions with the plaintiff as there is nothing to show that there were limitations to the extend of their transactions.

Turning to the law, the plaintiffs counsel submits that they are within the ambit of the prerequisites required to be fulfilled before one can earn a relief under order XXIV rule 6 CPR as it was then because the defendant through its agents entered into a compromise agreement out of court with the plaintiff on the 4th day of March,2008; the agreement is agreeable to both sides as the same arose from a consensus between their experts and legal representatives and evidenced by the fact that it was handed over to the plaintiffs. There is no allegation of fraud, duress, coercion or other elements vitiating the consent; the plaintiff decided to present the application for entry of Judgment on the basis of the application subject of this ruling in order to enforce a compromise reached; no evidence was adduced to show that their instructions to consent had been given under a misdescription; the law does not allow a party who has consented to a compromise to arbitrarily withdraw his consent.

Since there is no evidence that the dependant/Respondent counsels authority to negotiate a binding compromise had been withdrawn, the same should be upheld by the court more so when the Attorney Generals office has not stated that the authority donated to their advocate had been withdrawn. Neither have they stated that they did not appoint their own expert to appraise them on the quantification. The defendants had ample time to consider the documentation on the plaintiff's quantifications and for this reason they cannot be allowed to recoil from their commitment. There is no evidence adduced by the defendants to show that their agents acted contrary to express negative directions or that a limitation placed by the defendant upon their agents express and or implied authority over the conduct of the litigation executed or was brought to the attention of the plaintiffs. Contends that the Attorney General being the agent of the Ministry of Lands/Commissioner of Lands had the authority to compromise the suit which he did considering that the Attorney General through his advocate had his client's instructions to do so. There has been no indication that those instructions had ever been withdrawn.

(i) By reason of what has been stated above the defendant having held out their advocate as well as their expert as having the authority to act on his behalf then the defendant is estopped from denying the authority of such person to act. In addition any action taken by such agent binds his principal as if performed by the principal himself. The defendants advocates on record held out Mr.J.P.G. Tuamwari as their expert in their correspondences and statements to court, the defendants is estopped from denying the report prepared by their own expert following agreement of both parties and cannot claim that his opinion is not their common opinion. For this reason the court should not allow the Attorney General to wriggle out of its decision to compromise the suit. In conclusion the court is urged to find that the plaintiffs claim falls into the ambit of order XXIV rule 6 because there was a valid and legal compromise of the plaintiffs claim for damages pursuant to the meeting between the plaintiffs legal representative and the experts on the 4th March,2008 as evidenced by the content of the report prepared by the defendants own experts; the defendant cannot arbitrarily refuse to honour the compromise Agreement reached on the 4th March, 2008 simply because it does not like or agree with it. It is bound by the terms of the settlement following its instruction to its advocate, the Attorney General; the defendants counsel statements to the court during the period that the matter was being discussed and thereafter clearly point to the fact that there was a final settlement and that the only issue left was on the mode of payment.

There is another set of submissions dated 25th day of February, 2009 and filed the same date by the plaintiff. A perusal reveals that they raise the same points as those raised in the assessed submission and as such there is no need to analyze them.

The Respondents submission are dated the 16th day of September, 2008 and filed on the 17th day of September, 2008. The salient features of the same are as that in order to avail themselves of the provisions under order XXIV rule 6 CPR the plaintiff/applicant has to demonstrate the existence of a lawful agreement or compromise between the parties;

(a) Existence of ability of the court to order the parties to record the agreement or compromise and existence of ability on the part of the court to pass a decree based on the recorded agreement or compromise. It is the stand of the defence that on the basis of the documentation presented to court, the principles that govern the recording of a compromise are the same as those that govern the formation of a contract when applied to the scenario herein it is the stand of the defendant that the sequence of events is

that vide annexture AVC10 the plaintiff gave to the Respondent the offer to settle this matter at Kshs.18,801,206,400.00 based on an expert report made by an Agricultural Economist Mr. Jotham O. Munda, annexture 8 another report by property wise Kenya limited which is a property consultants company and a report by the actuarial and benefit consultants limited.

It is on record that the said offer was rejected by the defendant/Respondents who commissioned an economist at the treasury Mr. J.P.G. Tuamwari to evaluate the 3 reports who gave an opinion to the effect that the quantum of damages should be Kshs.815,424,000.00 as demonstrated by the content of annexture 17. It is the great variance between the two opinions which necessitated a meeting between them to iron out their difference, which resulted in a 3rd opinion by the said Tuamwari that inflated the quantum to Kshs.6,015,113,000.00 as demonstrated by the content of annexture AVC20.

(i) It is the contention of the defendant/respondent that the Ministry of Lands as well as the Ministry of Finance rejected the opinion of Mr. Tuamwari on this inflated quantification and in the process also rejected offer to settle. The offer to settle the matter out of court having been rejected as above, there is no agreement or compromise or contract that can be brought within the ambit of order XXIV rule6 CPR.

The defendants/respondent contends further that there is no agreement signified by existence of a written consent signed by counsels of both parties capable of being filed in court for endorsement or alternatively one which is capable of being dictated to court for the court to record the same and then have parties or their representatives endorse the same on the court record. In the absence of the existence of an agreement as contended above, there is no basis upon which this court can be called upon to pass a decree with the ultimate result of a compromise or settlement being reached. By reason of what has been stated above, the defendant/Respondent contends that the applicants application dated 23rd day of July,2008 is fundamentally defective in so far as it seeks entry of a judgment in a manner not envisaged by order XXIV rules 6 of the CPR, it does not pray for the recording of a lawful agreement or compromise if any, and lastly does not pray for the passing of a decree based on a lawful agreement. Contends that what is sought to be relied upon by the applicant is an expert opinion which has not been tendered in evidence and tested on cross examination and which the opinion was rejected because it was inflated; it had not been assessed in accordance with the applicable principles namely on the basis of a presentation of a fair rental value of the land by the Trespasser where as herein it was based on loss of income from the fish processing and warehousing which was erroneous.

With regard to authority of an advocate, it is the contention of the defendant/Respondent further that they concede an advocate has ostensible authority to compromise a suit however that authority cannot be implied where counsel consents to orders which are diametrically opposed to the express instructions of his/her client. It therefore follows that any decree based on an advocates ostensible authority may be varied or discharged if it was obtained by fraud, 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. Lastly that the issue of ostensible authority can only be used as a shield by a party who has a favourable decree or order as opposed to a party seeking to enforce a disputed compromise or agreement as presently sought herein.

The plaintiff responded to the defendant/Respondents submissions by a reply dated the 21st day of July,2009 and filed on the same date wherein in a summary form the following have been high lighted.

(i) The defendant/Respondent has misconstrued the intent and purport of order 24 rule 6 CPR because:-

(a) There is a wrong assumption that the said order follows a two tier system whereby the court is first of all to establish the existence of an agreement, adjustment or compromise before entering judgment when infact what the plaintiff has done herein is to ask the court to look at an already reached compromise or agreement which has already been arrived at between the parties and if the court is satisfied that indeed there is a compromise, adjustment or agreement proceed to enter judgment in terms of the compromise, adjustment or agreement as requested in the application.

(b) The plaintiff has fulfilled its duty of laying before the court in un equivocal evidence which goes to

demonstrate that indeed both parties discussed the matter and reached a compromise or agreement based on the evidence on the steps taken by the parties and the consequence of the said steps. The court has not been asked to open up the evidence the parties used to arrive at the said compromise or agreement.

(ii) They contend that the plaintiff/applicant has brought itself within the ambit of the provisions of order 24, rule 6CPR because –

(a) The plaintiffs stand is that there is in place a compromise or agreement which was reached between the parties.

(b) The defendant/Respondent refused to record the said consent or settlement in court.

(c) The plaintiff had no alternative but to present an application as a vehicle for presenting evidence to court to show that indeed there had been a compromise or an agreement.

(d) There is sufficient material placed before the court to entitle the court grant the plaintiff the relief sought.

(iii) With regard to the law, the applicant contends that they are within the principles governing the granting of the relief sought because:-

(a) It has been asserted by the plaintiff that an adjustment has been reached. Where as the defendant has denied the same. So the only proper forum to decide which of the two versions is the correct version is the court. The plaintiff is therefore before the proper forum.

(b) Proper construction of the provisions of the law under which the application was presented contemplates the presentation of only one application for establishment of the existence of the compromise or an agreement and then proceed to enter judgment in terms thereof. In the premises, it is the stand of the plaintiff that their application is properly framed and has properly been presented by the plaintiff as the party who wishes to benefit from the compromise and it is now left to the court to determine the controversy between the parties as to whether there is a compromise or not. In doing so, the court will base its reasoning on the material placed before it and not to impose its own view and if satisfied with the explanation made by the plaintiff it will proceed to grant the relief sought.

(iv) With regard to the stand taken by the defendants in opposing the plaintiffs application, it is contended that the same does not hold because:-

(a) After the plaintiff had given its quantification of the claim, the defendant/Respondent asked its own expert to scrutinize the plaintiffs quantification and it is the defendant/Respondents' own expert who come up with a quantification of Kshs.851,451,424.00.

(b) That it is the defendant/Respondent who suggested that in view of the variance in the quantifications, there was a need for experts of both sides to hold joint meetings to iron out or fine tune the variance.

(c) The meetings were indeed held and representatives of both sides participated in the said meetings and fine tuned the variance and that is when the defendant/respondents' own expert came up with the amount to be enforced of Kshs.6,015,113,000.

(d) It is on record from the court record proceedings that it is the defendant/respondents' own representative who consistently informed the court that negotiations were going on and that a settlement was anticipated.

(e) The existence of a compromise is informed by the existence of the fact that the amount arrived at by both sides was Kshs.8,020,593,000.00 whereby the defendant/respondent through its agents asked for a reduction of 25% which the plaintiff acceded to bringing down the quantifications to Kshs.6,015,113,000/-.

(f) It has not been denied by the defendant/respondent that they forwarded to the plaintiff the document containing the said compromise.

(g) At no time did the defendant/Respondent after handing over the said compromise to the plaintiff ever ask the plaintiff that they restart negotiations a fresh.

(h) At no time did the defendant/Respondent ever indicate to the plaintiff that the said compromise needed to be ratified, approved and or confirmed by any other authority of the defendants.

(i) There has been no demonstration by production of documentary proof to show that indeed the compromise reached needed to be ratified, approved and or confirmed by any other authority.

(j) There is no representation by the defendant/respondent either orally made by its agents in court and or by way of correspondences between them and the plaintiff to show that the final compromise needed to be ratified, approved and or confirmed by any other authority before it could be acted upon.

(k) To fortify the plaintiffs' stand as in number (h) (i) and (j) above if indeed such instruction and or documents or correspondence existed to the effect that every compromise and or agreement reached by the parties needed to be ratified, approved and or confirmed by any other authority within the defendant/respondent such evidence would have been tendered in court through an affidavit none of which has been furnished.

(l) The defendant/respondents counsel and the expert involved in the negotiation have not deponed affidavits confirming that what the defendant/Respondent is currently alleging is the correct position and the court is invited to find this change of mind as an after thought.

(v) The defendant/respondents contention that the provisions of section 8(1) of the governments contract applies to the compromise reached herein, does not hold because:-

(a) There was no preconditions put before 4th March,2008 that the defendant/Respondents own expert could not sign any compromise that may result from the negotiations.

(b) There has been no indication and or proof given by the defendant/respondent as to who was to sign the compromise reached if not the expert who had participated in the negotiations.

(c) The defendant /Respondent is bound by the principle that unless a party withdraws and or limits the instructions to their agent and communicates the same to the apposite party the said party cannot be allowed to take refugee under the said plea of withdrawal and or limitation to the detriment of the opposite party who had no knowledge of such withdrawal or limitation.

(d) Failure of the defendant/Respondent to consent to the recording of a settlement does not rob that consent the validity of it having been consensual.

(e) Failure to have the consent recorded as a consent in court with the consent of the parties does not rob such a consent its validity. The law allows for a party to it who is aggrieved to seek the courts intervention to have it enforced.

(f) The defendant/Respondent cannot be allowed to withdraw its consent to the compromise even as an after thought because the plaintiff acted on it and altered its position by settling for a much lower figure in order to have this long standing dispute brought to a close.

(g) Even if it can be said that the defendant/respondent withdrew and or limited instructions to its agents which is denied , this does not rule out existence of an implied authority.

(vi) The defendant/respondents contention that the compromise cannot hold because it was signed only by J.P.G. Tuamwari does not hold because:-

(a) The defendant/Respondent had not faulted their earlier quantification of Kshs.851, 424,000.00. which had likewise been prepared by J.P.G. Tuamwari only.

(b) Both parties had mandated Mr. J.P.G.Tuamwari to fine tune the compromise and come up with the final copy which he did.

(c) The Defendants/Respondents' counsel who is the Attorney General who received it first found it in order and that is why they forwarded a copy to the plaintiffs counsel on record.

(d) The plaintiff has knowledge that when both sides reached a consensus that the defendant/respondents expert does prepare the final report and sign it, there was no objection raised by the defendant/respondent that their expert should not be the one to sign it alone.

(e) The earlier quantification by the Defendant/Respondents had not even been signed by J.P.G. Tuamwari their expert and yet it had been accepted by the Defendant/Respondent and then forwarded to the plaintiff for action.

(f) It was not a pre condition that in order for the compromise or agreement to hold, it had to be signed by all the participating parties.

(g) The most important aspect of the compromise or agreement is the substance which is sought to be enforced and not the signature.

(h) It is clear from the preamble of the said compromise or agreement that both parties had agreed to the contents and the quantum and the defendants even sought a reduction of 25% from the plaintiff which was given.

(vii) With regard to the legal position suggested by the Defendant/Respondent it is the contention of the plaintiff/Applicant that this too does not hold because:-

(a) There is no legal requirement that in order for a compromise or agreement to hold it must be reduced into writing and signed by all the parties in order for parties to dictate the terms of a compromise to court for endorsement.

(b) There is liberty to the court to construe the facts on its own at the invitation of one party who alleges existence of a compromise or agreement and another claims existence of such a compromise or agreement.

(c) In asserting the need for the agreement, or compromise to be in writing, the Defendant/Respondent has relied heavily on the provision of mulla on code of civil procedure whose provisions on the subject are not similar to those contained in the prevailing enabling provision as provided for in order 24 rule6 CPR and for this reason this court is urged to apply the provisions of the enabling provision and not the persuasive provision suggested by the Defendant/Respondent.

(viii) With regard to case law cited by the Defendant/Respondent, the plaintiff still asserts that these are distinguishable from the facts herein because:

(a) There was no evidence tendered to show that the Defendant/Respondent had put a limitation to the agents Authority and brought that to the notice of the opposite party the plaintiff.

(b) By reason of what has been stated in (a) above, the rule of estopel would operate to deny the defendant/Respondent a right to rely on their assertion of limitation of authority whose evidence has not been tendered on the one hand and on the other hand was not brought to the attention of the opposite party the plaintiff.

(c) On the facts presented herein, the Defendant/Respondents' assertion that the signature of their own

expert Chief Economist J.P.G. Tuamwari does not bind them is an after thought.

(d) The provisions of section 2 and 8 of the government contracts Act do not apply to the issues in controversy herein because parties were not negotiating a government contract but a compromise or agreement to be endorsed by the court as a judgment of the court as this arose from a civil suit against the government and for this reason the court is invited to hold that a suit against the government does not qualify to be a contract between the plaintiff and the government.

(e) On the basis of facts presented herein and their own admission by the Defendant/Respondent Mr. Tuamwari was called in as an expert- Chief land Economist to render an expert opinion. He was not called in as a government official perse to sign a government contract.

(f) The defendant/Respondent has not demonstrated in which way the expert opinion given by Mr. Tuamwari could qualify to be a government contract.

(ix) The Defendant/Respondents' stand that their expert Chief Land Economist Mr. J.P.G. Tuamwari needed specific authorization to sign a binding opinion does not also hold because:-

(a) There was no such requirement placed on the said expert when he rendered his opinion in the case of the first quantification of Kshs.851, 424,000.00 and for this reason there can be none for the subsequent quantification.

(b) Nowhere in the negotiations and the numerous court appearances did the Defendant/Respondent intimate even to the court that their expert needed express authority from either the Ministry of lands or Ministry of Finance before endorsing the resulting opinion.

(c) The issue of lack of authority on the part of J.P.G. Tuamwari in order for his signature to bind the Defendant/Respondent has been raised just to assist the Defendant/Respondent' resile on the compromise reached and it is just an after thought.

(x) The Defendant/Respondents contention that their own expert opinion does not bind them as a compromise or agreement does not hold because:-

(a) The opinion rendered or reached is not meant to allow the court to reopen and reassess the facts but to enable parties record the compromise into an enforceable order or judgment.

(b) It is the Defendant/Respondent themselves who paraded him as an expert and they cannot now turn round and claim to be wanting to interrogate his qualification in cross-examination. At least the plaintiff does not want to cross-examine the said expert.

(c) The Defendant/Respondents allegation of there being a need to cross-examine their own expert is nothing but a ploy by them to run away from the compromise.

(d) The court is being called upon by the Defendant/Respondent to rewrite the compromise between the parties after reevaluating the evidence and hearing the cross-examination on the one hand and on the other hand in the process assist the Defendant/Respondent escape their liability under the compromise already reached.

(e) The plaintiffs quantification was not refereed to Mr. J.P.G. Tuamwari for reassessment but for verification.

(f) Mr. J.P.G. Tuamwari was paraded by the Defendant/Respondent as their own expert and the plaintiff having altered its position in acting along that parading the Defendant/Respondent should not be allowed to with hold that assurance from the plaintiff. They should be ordered to remain bound to it till the conclusion of the matter. More so when no allegations of impropriety has been leveled against the said expert.

(g) Because neither the Ministry of Lands or the Ministry of Finance has raised complaints of impropriety against their agent the Attorney General and its officers then all the trans.

(xi) By reason of what has been stated above in response to the Defendants/Respondents submissions, the court is urged to find the Defendant/Respondents' submissions as well as deponements in opposition to the plaintiff/applicants application ousted and of no consequence and find that on the basis of arguments presented earlier as well as these current arguments the plaintiff is entitled to the reliefs sought.

At the close of the submissions both sides referred the court to case law principles as a guide. Those of the plaintiff/Applicant are in three sets. The first set was filed on the 16th day of September, 2008. In a summary form there is the case of **MC CALLUM VERSUS COUNTRY RESIDENCE (1965) 2 AA ER 264** wherein the court of appeal upheld establishment of a compromise reached by way of exchange of correspondence but declined to uphold a consent order purportedly made by the court where one part had intimated to the court that he was not consenting to the making of the order in court, the case of **HAWEU VERSUS CROYDON UNION RURAL SANITARY (1884) CH.D.249** wherein the court held inter alia that:- "Where counsel by the authority of their clients consents to an order, the clients cannot arbitrarily withdraw such consent but without prejudice to such a party making an application to be released from the consent on the ground of mistake, or surprise or some other sufficient reason; the case of **MATHEWS VERSUS MINISTER (1887) QBD141** where in the court upheld a settlement because the said settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant; the case of **REWEDGE; WEDGE VERSUS PANTER (A) (1908) CT.R436** wherein the court declined to allow a party to withdraw his consent in circumstances where the other party had already acted on that consent and altered its position; the case of **WELSH VERSUS ROE (a) (1918) LT REP 118** wherein the court held that: "where an action has been commenced the solicitor retained becomes the general agent of the client and has an implied authority to compromise the action and no limitation of such implied authority can be relied upon by the client as against the other side unless such limitation had been brought to the knowledge of the other side before the compromise was arranged. The onus is upon the plaintiff to show that that authority had been limited and there could be no limitation of that general authority by secret instructions; the case of **WAUGH AND OTHERS VERSUS H.B.CLIFFORD & SONS LIMITED AND OTHERS (1982) 1AII ER 1095** wherein it was held inter alia that:-

"In litigation, the ostensible or apparent authority of a solicitor or counsel to bind his client to a compromise of the action or counsel held himself out as possessing vis-avis the opposing litigant could be wider than his implied authority to compromise the action without prior reference to his client for his consent. Thus a solicitor or counsel could have ostensible authority to arrange a compromise when he infact had no implied authority. The only limitation vis avis the opposing litigant on the ostensible authority to compromise held out by a solicitor or counsel was that it could not be taken as authority to include in the compromise matters collateral to the suit, but that a part, the opposing litigant was not required to put the solicitor or counsel to proof of his authority regardless of the magnitude of the compromise or the burden if imposed on the client of solicitor or counsel. More over in the interest of not limiting too restrictively the ostensible authority of a solicitor or counsel to bind his client to a compromise, the subject matter of compromise was only to be treated as collateral to the suit in exceptional cases where it readily was extraneous to the suit.

(3) Since the buyers solicitors had had no notice of any limitation on the ostensible authority of the builders solicitor to compromise the action they had been entitled to assume that the builders solicitor had ostensible authority to compromise the transaction on behalf of the burilders on the terms contained in the letters of 1 and 30 May and June 1980; the case of KENYA COMMERCIAL BANK LIMITED VERSUS SPECIALIZED ENGINEERING COMPANY LIMITED (1982) KLR 485 wherein Harris J as he then was held inter alia that:-

(2) A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless, such limitation was brought to the notice of the other side.

(3) An advocate has general authority to compromise on behalf of his client as long as he is acting bonafide and not contrary to express negative direction. In the absence of proof of any express negative direction the order shall be binding.

(4) The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes that he would not have given his consent had he known these facts; the case of KENYA BUS SERVICE LIMITED VERSUS MUTETI (1995-1998) IEA 103 wherein the court of appeal held inter alia that: "Gneerally an advocate is authorized to act as his clients agent in all matters not falling within an exception which may reasonably be expected to arise for decision in the course of proceedings"

There is also a reliance on the Supreme Court practice rules (1995) Vol2 parts 2-18, paragraphs 3879, 4611. At page 1250 paragraph 3879 there is observation that:-

"**The solicitor on the record has a general control and authority over the procedure in the action and has a general authority to compromise an action provided he acts bonafide and reasonably and not in defiance of the clients express instructions"**

Page 1454 paragraph 4611 that:-

"**The circumstances that a material fact within the knowledge of the client and his solicitor has not been communicated to the counsel at the time when he gives his consent or an order in court is not sufficient ground for the client with drawing his consent to the order before it is passed and entered and does not prevent such a withdrawal being arbitrary…."**

Paragraph (4613) counsel has complete authority over the suit, the mode of conducting it and all that is incidental to it, such as withdrawing the record w, withdrawing a juror, calling no witnesses, assenting to a verdict…. Or to compromise any matter in the action… counsels, apparent authority to compromise cannot be limited by instructions not even withdrawal of instructions unknown to the other party.

At page 1455 paragraph 4614 there is observation that:-

"A solicitor has a general authority to compromise on behalf of his client if he acts bonafide and not contrary to express negative direction… No limitation of the implied authority avails the client as against the other side unless brought to their notice….A solicitor retained in an action has ostensible authority as between himself and the opposing litigant to compromise the suit provided that the compromise does not involve matters collateral to the action i.e which were extranous to the subject matter of the suit and the compromise would be binding even though it contained terms which the court could not have ordered in the actions and a solicitor or counsel may in a particular case have such ostensible authority visavis the opposing litigant where he has no implied authority vis avis his client."

The plaintiff went on further to rely on the case of **IN RE NEWEN CARRUTHERS VERSUS NEWEN (1903) ICN.D812** wherein the court held inter alia that:-

"**A solicitor on record has a general authority to compromise an action on behalf of his clients provided he acts bonafide and reasonably and not in defiance on his directs and positive instructions"**

The case of **HOLSWORTH URBAN DISTRCIT COUNCIL VERSUS RURAL DISTRICT COUNCIL OF HOLSWORTH (1907) CH.DIV.62** wherein the court held inter alia that:-

" the agreement having been entered into bonafide by both councils, was not rendered invalid by

the fact that one of the claims included in the compromise subsequently proved to be unfounded in law"

There is also reliance on the provisions of section 120 of the evidence Act cap 120 of the evidence Act cap 80 laws of Kenya on estoppels namely:-

"**When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing**" ; Blacks law Dictionary Eighth Edition on the definition of a consent as:-

"**Agreement, approval or permission as to some act or purpose especially when voluntarily made by a competent person…"**

Lastly the case of **TIWI BEACH HOTEL LIMITED VERSUS JULIANE VIRIKE STAMM (1988-1992) 2KAR189** wherein the court of appeal held inter alia that:-

"It is the duty of an applicant seeking relief from the court particularly on an exparte application to make full disclosure of all the facts immaterial to the application which are known to him or her"

Turning to the defences' case law there is reliance on Mulla the code of civil procedure volume-III page 3201-3204. The court has perused the same and the salient features of the same are that:-

(i) Under order 23 rule 3 a compromise petition signed by the counsel though not signed by the parties can be acted upon save that the counsel is required to act in good faith and for the benefit of the client and it is proper to consult and obtain instructions if time and opportunity permit.

(ii) The procedure on enforcement is that a consent decree under the said rule could only be passed after an order is made directing the compromise to be recorded.

(iii) Unless it can be clearly established that such accord or compromise has been entered into between the parties, the powers under order 23 rule 3 cannot be exercised.

(iv) If there is a dispute as to whether there is an agreement or compromise or not in regard to the whole or part of a suit the court has to determine that dispute.

(v) It is not the duty of the court to make out an agreement for the parties when a party cannot on its own show that both the parties had agreed and the other party is merely trying to resile from the agreement.

(ii) An agreement to compromise a suit must be established by general principles which govern the formation of contracts though there are special rules governing its enforcement.

The defence also relied on cross on evidence second Australian Edition 1980 supplement page 426 wherein there is observation that:-

"**The court is expected to rule on the qualification of an expert witness, relying partly on what the expert himself explains and partly on what is assumed…."**

On case law there is reliance on the case of **NGUKU VERSUS REPUBLIC (2004) 2KLR5** wherein the court of appeal held inter alia that-

"An expert should come to court prepared to justify his opinion by arguments and demonstration but he need not necessarily be called upon to do so. In many cases it is sufficient if the witness gives his opinion and the more eminent the expert, the less the need for demonstration"

The case of **REPUBLIC VERSUS DISTRICT LAND REGISTRAR NANDI & ANOTHER EXPARTE TEGEREI & ANOTHER (2005) 1KLR 521** wherein Musinga J held inter alia that:-

"**Although an advocate has ostensible authority to compromise his clients case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he had been given by his client in the matter** and lastly the case of **KAISI CONSTRUCITON COMPANY NAIORBI HCCC NO.3345 OF 1987** decided by E. Owuor as she then was on the 16th day of November,2000 wherein the centrol issue for Consideration therein was whether or not a legally and properly executed contract existed between the parties. The defence put forth was non compliance with section 2 governing contracts on behalf of the government. After due consideration the court accepted that the officer who endorsed the acceptance notes was perfectly in order save that the authority to sign the acceptance notes required to be given in writing had not been given as such.

The parties also presented oral high lights of their written submission as well as those of the opposite party and appraisal of principles of case law relied upon by either side. In a summary and for purposes of the record only those of the plaintiff stressed that they are within the ambit of the provisions of order 24 rule 6 CPR, that only one application is required to be presented by them in which the court is called upon to perform a dual role whereby it firstly moves to establish existence of a compromise and then where appropriate proceeds to enter judgment on the basis of the compromise; the cause of action stems from the defendants unlawful registration of a caveat on the plaintiffs suit land which caveat prevented the plaintiff from carrying out developments; this was injury to the plaintiffs enjoyment of proprietary rights; the plaintiff was in the premises rightly entitled to move to court to seek redress; the defendant/Respondent attempted to defend but were denied that right hence the move to proceed by way of formal proof; the plaintiff would have moved and completed the trial by way of formal proof had the defendant/Respondent not made an offer to settle; the plaintiff in good faith accepted the offer and partly negotiated a settlement sought to be enforced from which the Defendant/Respondent seeks to resile and which move this court should not allow as this will prejudice the plaintiff.

On principles of law and case law applicable the court was asked to go by the plaintiffs counsels' construction of the case law principles and their applicability to the facts herein and dismiss the construction of the defendant/respondent as explained in the submission with leave to stress the following:-

a) The defendants counsel on record had both ostensible and implied authority to abandon the formal proof procedure and opt for the negotiation with a view to recording a settlement procedure.

b) There was no with holding or limitation of that authority to negotiate and reach a settlement.

c) The plaintiff acted on that holding out of the counsel as having both ostensible and implied authority and altered its position and for this reason the defendant cannot be allowed to resile from it.

d) The negotiations and conduct of the parties resulted in a valid and binding compromise which should be enforced by the court.

e) The facts of the case law cited by the Defendant/Respondent are distinguishable from the facts of the case subject of these proceedings.

The state on the other hand in their oral highlights reiterated the content of their deponements and written submissions as well as case law relied upon and still reiterated that the application is incompetent, the expert opinion relied upon by the applicant cannot hold until the expert is called to the witness stand and his expertise tested on oath; the compromise was not signed by the respective parties counsels and no explanation was given as to why they did not and for this reason it is not binding; it is not binding on the government as the party singing it is not an authorized officer interms of the government contracts Act cap 25 laws of Kenya.

While commenting on case law cited by them, learned counsel for the Defendant/Respondent maintained that the case law relied on by them is relevant while those cited by the plaintiff/applicant relate to situations where a compromise exists which is not the position herein and are therefore irrelevant to the situation in controversy herein. Lastly that the principle of estoppel has no applicability to the issues in controversy herein.

In response the plaintiff/applicant reiterated that they have made out a case to warrant their being granted the reliefs being sought in the application subject of this ruling.

This court has given due consideration applicability to the issues in controversy herein.

In response the plaintiff/applicant reiterated that they have made out a case to warrant their being granted the relief being sought.

This court has given due consideration to the afore set out assessment and the court proceeds to make findings on the facts as here under.

(1) It is undisputed that the plaintiff herein is the registered proprietor of all that parcel of land known as LR. No.12425 registered under the Registration of Titles Act chapter 281 laws of Kenya.

(2) By reason of the afore stated Registration, the plaintiffs proprietorship is protected under the provisions of section 23(1) of the afore stated parent Act. It provides:-

"**The certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances , easements, restrictions and conditions contained therein or endorsed thereon, and the Title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.**

(2)…

(3) By reason of the security of Title or proprietorship conferred upon the plaintiff and guaranteed by section 23(1) of the R.T.A (Supra) the plaintiffs were supposed to be the exclusive users and determiners of what use the suit property could be put to with the only caveat being that the use be within the limits permitted by law.

(4) The plaintiffs herein became aggrieved by reason of actions committed against the said Title by the defendants allegedly undertaken by the Registrar of Titles under section 65(f) and (i) of the R.T.A. (Supra). These provide:-

"**65 (1)A registrar may exercise the following power in addition to other powers conferred under this Act-**

(f) he may enter a caveat on behalf of the government to prohibit the transfer or dealing with any land belonging to or supposed to belong to the government and also to prohibit the dealing with any land in any case in which it appears to him that an error has been made by misdescription of the land, or otherwise in any certificate of Title or other instrument, or for the prevention of any fraud, or improper dealing or for any other sufficient cause.

(i) He may at any time, after such inquiry and notices if any as he may consider proper and upon production of such evidence as may be prescribed or as he may deem necessary, withdraw from the register by cancelation or a otherwise any instrument or memorial which he is satisfied has determined or ceased or been discharged or for any other reason no longer affects or relates to land"

(5) The contention of the plaintiff has all along been that the registration of the caveat was uncalled for and unnecessary; the registration of the said caveat by the defendants against the said plaintiffs title prevented the plaintiffs from utilizing the said property for the purpose for which the same had been acquired namely fish processing and Ware Housing; that there was no good cause to warrant the defendants registering the said caveat in the manner done; and that the defendants took long to reverse the situation and in the process squatters came and invaded the land making it impossible for the plaintiffs to make use of the said land.

(6) It is the afore stated grievance which compelled the plaintiff to move to court and seek to compel the defendants firstly to remove the squatters and secondly to pay damages and or compensation for the plaintiff loss of use of the suit land or alternatively to call upon the defendants to justify the legality and lawfulness of their action. This is what gave rise to the original plaint and as subsequently amended being presented to court.

(7) It is on record that indeed the defendants moved to defend the claim and put in a defence which they subsequently sought to amend but their move to amend their defence was forestalled by the plaintiffs move to have the original defence struck out for not measuring up to the plaintiffs claim. Parties were heard on their merits on this move by the plaintiff to strike out the defence and the court agreed with the plaintiffs in its ruling dated 22nd day of September, 2006 annexture AVC5.

(8) The striking out of the defence paved the way for the plaintiff to move and indeed did move to prove its claim by way of formal proof and according it is undisputed that the plaintiff moved and set down the suit for merit formal proof. It is undisputed that the merit formal proof was not undertaken because the defendants made the first move to make an offer to have the matter negotiated and settled otherwise than by way of formal proof, a move the plaintiff welcomed. In pursuance of this move by the defendants the plaintiff altered its position and acceded to the offer to negotiate a settlement. The defendants also made the first move to ask the plaintiff to quantify its claim which the plaintiffs did based on assessment made by two of its expert. The plaintiff claim stood at 18 billion plus.

(9) It is undisputed that the defendants received that quantification and gave it to their Chief Economist in the Ministry of Lands one Mr. Tuamwari to analyze it. Indeed the analysis was done by the said expert and he come up with a figure of over 851 million as adequate compensation for the plaintiff.

(10) It is undisputed that by the defendant coming up with the quantification of Kshs.851 plus millions as the amount the plaintiff ought to be paid as compensation was a clear demonstration of admission of their wrong doing to the plaintiff in connection with the suit land and also an indication that they were under obligation to make good that damage once the correct amount payable is agreed upon.

(11) It is undisputed that the defendant's quantification was not accepted by the plaintiffs and that is when the defendants made the second move and suggested a joint meeting of the experts to sit down together and iron out the variance in the quantifications. Both sides are in agreement that indeed a joint meeting or meetings were held, negotiations done and the plaintiff's compensation was scaled down to 8 billion. The defendants agents asked for 25% reduction of this figure which was acceded to by the plaintiffs' agents for the reason being that the plaintiff was desirous of having this long standing dispute settled.

(12) It is undisputed that the negotiating agents did not come up with a consent prepared and signed by them but allegedly mandated Mr. Tuamwari to reduce the agreement into a document which was to be presented to court for endorsement as the settlement between the parties. It is common ground that indeed Mr. Tuamwari prepared the said document exhibited as AVC20. A perusal reveals the following content of the preamble of the said document:-

"**Following a meeting held at the AGs office between the representatives of Orbit Chemical Industries Limited Mr. Mathew Ouma Oseko (Advocate) for the plaintiffs and Mr Okudo Akumi expert, on one hand and representatives for government, a Mr. Antony Ombayo (Ombwayo) A.G. chambers and Mr.J.P.G. Tuamwari Ministry of Finance it was agreed that….** What follows the

preamble in the working out of the figure on the loss at the end of which a figure of 8,020,593.00 was arrived as the figure representing the net loss which was to form the basis of the quantification of the compensation payable to the plaintiff. Item 4 indicates that the government mitigated for a 25% claim amounting to Kshs.2, 005,480,000.00 which was acceded to by the plaintiff. Item 5 is the figure forming the damage claim worked out as Kshs.8, 020,593,000-2,005,480,000.00 bringing the figure down to ksgs.6, 015,113,000.00 which was to form the settlement figure**."**

(13) It is on record that both parties informed the court that a settlement had been reached and it was to be recorded soon. Thereafter several mentions were taken to enable the defendants agents obtain the authority to record the settlement to no avail.

(14) It is undisputed that the court does not have any documentation on what deliberation s took place in the defendants concerned establishment which led to the failure of the defendants agreeing to record the figure arrived at as a settlement. It only transpired after the plaintiff had moved to court and presented the application for enforcement that the defendant's deponents in their replying affidvaits indicated that the figure had been rejected because it had been inflated but gave no alternative and simply said that the plaintiff should move to court to prove its claim.

(15) It is common ground that the plaintiff declined to reopen and continue with the formal proof proceedings and instead opted to move the court to enforce the said alleged compromise. The defendant on the other hand apart from filing replying affidavits to the plaintiffs move, have not put in a cross-application for the court to find that what the plaintiff is relying on is not infact a compromise.

(16) As at the point of conclusion of argument on the application for enforcement of an alleged compromise, neither party has asserted that should the matter be reopened for disposal other than by way of enforcement of an alleged compromise they intend to introduce new evidence other than what has already been exhibited by them and what formed the independent assessments by their respective agents as well as the joint assessment. Neither is there indication that they intend to call in witnesses other than those already identified and those who were involved in the preparation of the documents being relied upon by either side either in support or in opposition of the application for enforcement.

(17) It is common ground that the defendants major reason for refusing to consent to the recording of the alleged compromise was because of the allegation that:-

(a) The amount is inflated.

(b) The amount was rejected by the Ministry of lands and Finance.

(c) It amounts to a contract intended to bind the government and yet Mr. Tuamwari is not an authorized officer in terms of the government contracts Act cap 25 laws of Kenya.

APPLICABLE PRINCIPLES OF LAW AND CASE LAW.

These have been extracted from legal texts and case law assessed and will be applied to the afore set out findings on facts in order to enable the court draw out conclusions for determiantion in the disposal of the matter.

(1) A compromise can be established by way of correspondences (see **MC Callum versus country residence** (Supra)

(2) Where counsel by the authority of their client has consented to an order (court order) the client cannot be allowed to arbitrarily withdraw from it to the detriment of the opposite party but such a client has liberty to apply to court to be released from the compromise on account of mistake, surprise or any other sufficient reason. (See **Hawe versus Roydon Union Rural Sanitary (Supra**).

(3) Where a settlement reached was within the apparent authority of the counsel, the same is binding on

the client (**Mathew versus Munster (Supra)**.

(4) A court will not allow a party to withdraw his consent on a settlement in circumstances where the other or opposite party has already acted on that consent or compromise and altered its position.

(5) Where an action has been commenced the solicitor retained becomes the agent of the client and has an implied authority to compromise the action and no limitation of such implied authority can be relied upon by the client as against the other side unless such limitation had been brought to the knowledge of the other side before the compromise was arranged. The onus is upon the plaintiff to show that the authority had been limited. There is no room or authority for the client to limit that authority by way of secret instructions (See **Welsh versus Roe (Supra**).

(6) Ostensible authority of counsel holding himself out to the other party as having such ostensible authority to compromise without reference to his client for consent is only limited by a caveat that the authority to so compromise does not include authority to compromise matters which are collateral to the suit.

(c) The opposite party transacting with such counsel holding himself out as having ostensible authority to act in the matter need not ask such counsel to prove the extend of his ostensible authority before transacting with him irrespective of the magnitude of the compromise.

(7) Limitation of ostensible authority is permitted save that there is a caveat that this should not be restrictively done. Only permitted to ward off collateral matters and by collateral is meant extraneous matters to the suit.

(c) Where the opposite party has no notice of the limitation, he is entitled to assume that the counsel had ostensible authority to compromise the transaction on behalf of the client on the terms contained in the compromise (See Waugh and others versus H.B. Clifford & Sons Limited (Supra).

(8) A duly instructed counsel has an implied general authority to compromise and settle the action. The client cannot avail himself of any limitation unless if that was brought to the notice of the opposite party. The only caveat placed on this authority is that the advocate who has been donated ostensible authority has a duty to act bonafidely and in the best interest of the client and bearing in mind that he should not act contrary to express negative directions in the absence of which the order shall be binding on the client notwithstanding the existence of the fact that a fact within the knowledge of the client was not communicated to the advocate when he gave his consent to the compromise (See KCB versus Specialized Company Limited) (supra).

(9) Generally an advocate is authorized to act as his clients agent in all matters not falling within an exception which may reasonably be expected to arise for discussion in the course of the proceedings (see Kenya bus service limited versus Mutai (Supra).

(10 A solicitor on record has a general authority to compromise an action on behalf of his client provided he acts bonafidely and not in defiance of his direct and positive instructions (See in Renewen Carruthen versus Newen (Supra).

(11) The doctrine of estoppel is also available when it comes to enforcement of compromise. Section 120 of the evidence Act cap 80 laws of Kenya provides:-

"**When one person, has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing"**

See the case of Sagoo Versus Dowado (1983) KLR 365 wherein the court of appeal held inter alia that:-

" A party who seeks to set up an estoppel must show that he in fact relied on the representations that he alleges be it a representation by innuendos and representation by conduct"

See also Sea Scapes Limited versus Development Company of Kenya limited (2009) KLR 384)

(12) There is need to make full disclosure when seeking a relief otherwise the relief will be withheld. (See Tiwi Beach Hotel versus Juliane Virike (Supra)

(13) A compromise signed by counsel but not signed by parties can be acted upon if there is demonstration that the counsel acted in good faith and for the benefit of the client.

(b) In the event of any dispute arising as to whether a compromise exists or not that dispute has to be resolved by the court with a caveat that the court has no power to write a compromise for the parties or rewrite it.

(c) Enforcement by the court is available where one party is arbitrarily trying to resile from it.

(d) Compromise formation is governed by general principles on the formation of contracts but different principles govern its enforcement (See Mulla code of civil procedure).

(14) An advocate has ostensible authority to compromise a suit but that is taken away where he consents to matters which are diametrically opposed to the express instructions which he had been given by his client in the matter. (See Republic versus District land Registrar Nandi and another expert Tegerei (Supra).

(15) In order for a government contract to be valid and enforceable it has to be endorsed by an authorized officer see the case of **Kalsi Construction Company versus the Attorney General (Supra).** See also section 2 of the government contracts Act cap 25 laws of Kenya. It provides:-

"Subject to the provisions of any other written law any contract made in Kenya on behalf of the government shall if reduced to writing be made in the name of the government of Kenya and shall be signed either by the accounting officer by the receiver of revenue of the Ministry or for the department of the government concerned or by any Public officer duly authorized in writing by such accounting officer or receiver of revenue either specially in any particular case or generally for any contracts below a specified value in his department or otherwise as may be specified in such authorization.

8(1) notwithstanding anything contained in this Act but subject to the provision of any other written law no contract to which this Act applies and which is made on or after the 16th June, 1978 shall bind the government in respect and to the extent of

(a) ….

(b) Any expenditure specified therein to be made by or on behalf of the government in excess of the sum of two hundred and fifty thousand equivalent thereof in the currency denominated in the contract calculated at the rate of exchange prevailing at the date of its signing unless such contract is signed or counter signed by the permanent secretary or Deputy permanent Secretary to the Treasury or a person or persons specifically or generally authorized by either in that behalf"

(16) Order XXIV rule 6 provides:-

"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 agreement compromise or satisfaction be recorded and enter Judgment in accordance there with.

(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"

(b) The ingredients required to be established before one can earn a relief under this provision are demonstration that:-

(i) There is in existence a suit.

(ii) The court has to be moved for action by way of an application by either party.

(iii) The court has to hear parties.

(iv) It is upon hearing the parties that it can form an opinion that the suit has been either wholly or in part been adjusted.

(v) The adjustment in whole or in part can only be accepted by the court if the same is based only lawful agreement or compromise.

(vi) Alternative to the above mode of adjustment is that there is another form of adjustment where the defendant satisfies the plaintiff either in whole or in part of the subject matter of the suit..

(vii) Upon satisfaction the court has jurisdiction to order that the suit has been adjusted and order the agreement or compromise or satisfaction recorded and then a judgment entered there to.

(17) Suit has been defined in the civil procedure Act as:-

"**Suit means all civil proceedings commenced in any manner prescribed."**

The court has applied the extracted principles of law and case law assessed above to the findings of facts also made above and the court proceeds to make the following final findings on the same.

1. **Competence of the plaintiffs claim**. The court has found the plaintiffs claim competent and properly laid because:-

(i) the plaintiff is the undisputed proprietor of the subject matter of these proceedings and by reason of this proprietorship the plaintiffs proprietary rights are not only guaranteed but protected by reason of the provisions of section 23(1) of the Registration of Titles Act cap 281 laws of Kenya. The protection is to the exclusion of all others. Faulting of the proprietorship can only arise where there is existence of proven fraud or misrepresentation to which the proprietor is proved to have been a party a situation not agitated by the defendants herein. Protection of proprietorship goes hand in hand with protection of the right to use and to determine the proper usage of the land.

(ii) The defendant as the protector and guarantor of those entitlements has limited powers of interference donated by the provisions of section 65 of the same Act with a caveat that these has to be demonstration that

(a) The land is supposed to belong to the government.

(b) There has been a misdescription of the land.

(c) Or on account of fraudulent dealings.

(d) Or any other sufficient reason.

(iii) It is undisputed that the defendant invoked its power under section 65(h) and prohibited dealings with the plaintiffs suit land only to turn out later on that there was no justifiable reason for doing so and then

exercised its mandate under section 65(i) to remove the caveat by which time the plaintiff had already suffered damage and loss for which the plaintiff was entitled to seek compensation.

(iv) The plaintiff legitimately laid its claim to which the defendant made a move to defend which move was declined by the court against which order the defendant attempted to appeal against but later on its own volition withdrew the appeal.

(v) By reason of the defendants failure to pursue its right to defend the plaintiffs claim, the plaintiffs right to claim damages and compensation for loss of user of its land as a result of the defendants wrongful caveating of the same became crystallized. The plaintiffs right to compensation became inescapable by the defendants and what was left was either for the quantification to be made by consent of the parties or by way of assessment by the court since the matter was already in law.

(vi) By reason of what has been stated in number (v) above the plaintiff was entitled to set down the suit for assessment of damages by way of formal proof which they did but were convinced by the defendants to put that process on hold and attempt negotiation of a settlement first.

2. **Competence of the plaintiffs application dated 23rd day of July,2008.** On the basis of the assessment done by the court herein is well founded and justified because:-

(i)The plaintiff has satisfied the ingredients set to be demonstrated under order XXIV rule 6(1) (2) as it was then in that there is in existence a valid suit; the plaintiff is a party to that suit and has moved the court in his capacity as the plaintiff seeking to enforce an alleged compromise reached; there is demonstration that the defendant seeks to resile from the alleged compromise; there is assertion of an alleged adjustment of the plaintiffs claim from 18 billion to six (6) billion; all that the plaintiff has done is to invite the court to make a finding that the suit has been wholly compromised; there is demonstration that only one application is required to be made under this provision to serve two purposes namely the establishment of the existence of a compromise and the request for the court to make orders in terms of the alleged compromise where sufficient reason has been shown to exist.

3. **Competence, soundness and or genuineness of the plaintiffs complaints.** On the basis of the assessment done herein, the court makes a finding that the plaintiff has a competent, sound and genuine complaint raised in its application dated 23rd July,2008 because:-

(i) Upon the court striking out the defendants defence in the manner done, and upon the defendant on its own volition withdrawing an intended appeal against this courts denial of the right to defend the plaintiff claim, the plaintiff duly moved and set down the claim for formal proof and even went as far as filing its list of documents and invited the defence to file their list of documents which the defendants failed to do.

(ii) It is the defendant who made the first move to invite the plaintiff on to the negotiating table by asking the plaintiff to quantify its claim which it did and gave to the defendant, the defendant handed it to its expert who came up with a quantification which the plaintiff rejected.

(iii) Upon the plaintiff rejecting the defendants claim sizing down of its claim the plaintiff and was ready to resume hearing of its claim by way of formal proof, it is the same defendant who suggested that the experts of both sides should sit down and iron out the variance which the plaintiff acceded to and indeed the ironing out of the variance was done resulting in the preparation and the signing of exhibit 20 by the defendants' servant and agent.

(iv) It is undisputed that the plaintiffs complaint was directed at a government Ministry namely the Ministry of Lands and by virtue of this, the defendant the Attorney General became the agent of the said Ministry for purposes of these proceedings. It is undisputed that the office of the Attorney General in turn appointed its officers to take full control of the conduct of this case. It is this same officers who fronted one Tuamwari a chief land economist in the Ministry of lands as an expert who could assist the plaintiff's expert narrow down the variance in the quantification of the claim.

(iv) It is common ground that neither the parent Ministry of Land or the offices of the Attorney General provided parameters within which the afore said officers were to operate with regard as to what they could do or not do with regard to the fine tuning of the quantification of the plaintiffs claim.

(v) Even upto the time of the final disposal of the rival arguments on the application subject of this ruling, no documentation was either tendered to the plaintiff or to the court that there was any invitation with regard to the extend of the quantification anticipated to be reached in terms of figures.

(vi) Neither is there proof that the officers who were handling the matter both from the Attorney General office and the Chief land Economist had instructions to hand over the resulting quantification to any other authority for confirmation before the same is granted to the plaintiff as an approved quantification.

4. **Competence of the plaintiff claim to the operation of the doctrine of estoppel as a shield against the defendants move to resile on meeting the quantified claim in exhibit 20.** From the assessment done above and upon application of principles of case law also assessed above, the plaintiff is entitled to take refuge under the doctrine of estoppel because:-

(i) The defendant is the one which made the first move to negotiate a settlement and the plaintiff altered its position by accepting to be diviated from its path of formally proving its claim and move on to the defendants negotiating table to negotiate a settlement.

(ii) At no time did the defendant intimate to the plaintiff that it was negotiating on a without prejudice basis and thereby made the plaintiff believe that the negotiation would result in an agreement to settle the dispute finally.

(iii) There is no indication as found earlier on that the negotiating agents had any limitation with regard to the extend of the negotiation being undertaken thereby making the plaintiffs' agents to negotiate whole heartedly for a final settlement.

(iv) There was no intimation that the defendants agent participating in the negotiations were not competent to do so.

(v) There is nothing to show that the defendants agents were not acting bonafidely and in the best interests of their clients considering that they managed to bring down the plaintiffs claim from 18 billion to 8 billion and even managed to secure a 25% reduction in favour of the defendant bringing down the plaintiffs claim from the figure arrived at of 8 billion to six (6) billion.

5. **Competence, legitimacy of the plaintiffs claim of entitlement to payment to it of Kshs.6,015,113,000.00.** From the assessment above and the application of principles of law and case law assessed on the facts assessed generally and the findings of facts in particular the court finds the plaintiffs claim to the afore stated sum sound and well founded because:-

(i) The only reason that the defendants have advanced for not wanting to meet the said amount is because they allege that:-

(a) the amount is inflated.

(b) It was rejected by both the Ministry of lands and Finance.

(c) Mr. Tuamwari is not an authorized officer who can enter into contracts capable of being held to bind the government.

(e) If the claim is allowed to stand, it will cripple the operations of the Ministry of Lands whose budgetary allocation is minimal.

(ii) The court finds the above assertions or excuses given by the defendant in wanting to resile from its

obligations under the compromise ousted because of the following reasons:-

(a) The defendants cannot claim to hide under an allegation of the figure being inflated when in fact it has been greatly reduced from the initial figure of 18 billion. Secondly the mere allegation that the figure is inflated does not hold in the absence of any mention that the defendants were going to take steps to have another group of agents work on the said figure. Allowing this assertion to stand will amount to leaving not only the plaintiff but the proceedings in an embarrassing position contrary to the rules of the game of litigation whose ultimate aim is to assist parties resolve their disputes signified by the litigation being brought to an end. 3rdly there has been no suggestion of any suitable alternative figure to justify compensation to the plaintiff.

(iii) With regard to the allegation that the claim was rejected, the court agrees with the assertion of the plaintiff and as assessed herein that no evidence has been tendered to the court to show that any meeting was ever held and a decision taken by the relevant authority rejecting the claim. The dependants assertion therefore a mere allegation.

(iv) With regard to lack of authority in Tuamwari to bind the government in terms of the provisions of the government contracts Act cap 25 laws of Kenya , it is the finding of this court that this does not hold because the agreement arose from a court proceeding and not negotiations of a government contract as such the provisions of the said law does not apply. Secondly there was no limitation placed on the capacity of Mr. Tuamwari to negotiate a settlement. 3rdly there is nothing to show that he exceeded his mandate considering that he is the one who made the first assessment of Kshs.851, 424,000.00. 4thly he was paraded as an expert being the chief land economist in the Ministry of Lands. 5thly there has been no demonstration that he was disciplined for any misconduct in the line of duty arising from his endorsement of the compromise reached. 6thly no good reason was given by the defendant as to why him Mr. Tuamwari and the participating counsel Mr. Antony Ombwayo never deponed replying affidavit in order for them to be availed to the court and the plaintiffs for cross-examination. The defendants failure to field these two crucial persons is clear indication that the two would not have been mean enough to depone to falsehood. They would have told the court the truth to the detriment of the defendants. It therefore follows that this is a clear demonstration that the defendants with held material evidence from court and this conduct will be construed against them.

(v) With regard to inability to pay, this does not hold as the same is premature. It will arise at the point or execution.

6. **Competence, necessity and justification for the court reopening the matter for continuation of assessment of damages by way of formal proof instead of terminating it by way of compromise.**
From the assessment of the facts on the record in general and application of the principles of law assessed herein the court is of the opinion that no useful purpose will be served by the court reopening the matter and have it proceed for assessment of damages by way of formal proof because:-

(i) Neither party has intimidated to court that they intend to rely on any other evidence other than what has already been presented by them and assessed by their expert and this court.

(ii) Case law assessed is to the effect that failure of the parties to endorse an alleged compromise does not rob that compromise of its validity so long as the court can determine that indeed a compromise was reached. It has been shown that exchange of correspondence and conduct of parties are pointers. Herein parties exchanged correspondences on their desire to reach a compromise.

(iii) There has been no deponement from Mr. Tuamwari as well as Mr. Anthony Ombwayo who represented the defendant to show that they did not agree that only Mr. Tuamwari would sign the final document forming the compromise sought to be relied upon by the plaintiff.

(iv) There has been no indication that the defendants will not rely on the said two officers as key witnesses.

(vi) There is no indication that there is a desire by either side to call in any other more evidence.

For the reasons given in the assessment above, the court is inclined to grant the plaintiff's application dated 23rd day of July,2008 and filed on the 24th day of July because:-

(1) The plaintiff's claim is competent and well laid.

(2) The plaintiff application dated the 23rd day of July, 2008 and filed on the 24th day of July 2008 is well anchored an order XXIV rule 6 as it then was and raises genuine grievances against the defendant.

(3) The plaintiffs' complaints raised against the defendants which compelled the plaintiff to move to court and file the afore mentioned application have been found by this court to be competent, sound and genuine.

(4) The plaintiffs' move to take refuge under the doctrine of estoppel and use it as a shield to prevent the defendant from resiling from the compromise reached between them is well founded.

(5) The plaintiff has shown a well founded and sufficient cause for seeking the courts' intervention to compel the defendant not to resile from the compromise reached.

(6) There is no justification demonstrated to exist in order to entitle this court to reopen the matter to allow parties to proceed by way of formal proof rather than endorse the compromise reached between the parties for enforcement.

(7) In summary the plaintiff is entitled to the reliefs sought because the settlement or compromise reached was within the apparent authority of agents of both sides; there was no withholding of this apparent authority from its agents by the defendants; the plaintiffs agents acted on the apparent authority donated to the defendants agents and altered their position firstly by putting the ring of the hearing formal proof on hold in favour of negotiating a settlement and secondly by conceding to the down sizing of their claim from 18 billion to 8 billion and then conceding to a further 25% reduction of the claim in favoour of the defendant bringing it to six billion; there is nothing to show that the said authority of the defendants agents to negotiate and reach a settlement had any limitation tagged to it by the defendant; in any case even if there was such a limitation , the same does not hold because no such limitation was brought to the attention of the plaintiff; there has been no contention that the said defendants agents were not acting bonafidely in the interests of their client; the plaintiffs' contention that the said defendants agents acted bonafidely and in the best interests of their clients has not been ousted; there has been no indication that the settlement reached is diametrical to the defendants interests as the defendants interest was to settle the plaintiffs claim for compensation; inability to meet the plaintiffs claim is not one of the reasons that can be advanced by a party in seeking the courts intervention in withholding the recording of a compromise; failure of the parties or the instructing clients to endorse the compromise reached does not operate to rob a concluded compromise of its validity because a compromise can be deduced from even correspondences and the conduct of the party. Herein both correspondences exchanged between the parties and the conduct of the parties all go to show that parties intended earnestly to reach and record a compromise; the plaintiffs assertion that both sides agreed that Mr.Tuamwari was the one to endorse the compromise has not been ousted as the defendants failed to field Mr. Tuamwari as a deponent; taking all the relevant circumstances into consideration the defendant is arbitrarily seeking to resile from the said compromise and this court is inclined not to allow it to do so to the detriment other plaintiffs; and lastly there is nothing to show that the defendants agents committed any illegality in favour of the plaintiffs to the detriment of the defendants as there is no mention that the said agents were disciplined by their respective employers in connection with the settlement reached; proof of rejection of the settlement by the relevant authority has not been proved to exist.

For the reasons given above the court proceeds to make the following orders in the final disposal of the matter.

(1) Prayer 2 of the application dated 23rd July, 2008 and filed on the 24th day of July, 2008 be and is

hereby allowed and ordered that the plaintiffs formal proof application presented herein be and is hereby marked as having been wholly adjusted or settled in terms of the compromise agreement reached between the parties on the 4th day of March, 2008 in terms of annexture 20.

(2) By reason of what has been stated above, an order be and is hereby made and ordered that Judgment be and is hereby entered against the defendant in the sum of Kenya shillings six billion and fifteen million, one hundred and thirteen thousand (Kshs.6,015,113,000.00)

(3) Since the rate of interest was not included in the compromise the court orders interest to run at court rates from the date of assessment of 4th March, 2008 till payment in full.

(4) The plaintiff will have costs of the suit as well as this application paid for by the defendants.

(5) Further interest claimed in prayer 5 at the rate of 14% is declined because it was not included in the compromise.

(6) The resulting Judgment will be enforced in the usual manner.

(7) There will be liberty to apply to either party if need be.

(8) The delay in the drafting and delivery of this ruling which is highly regretted was occasioned by systemic work constraints.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA

DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 12TH DAY OF OCTOBER, 2012.

JUDGE