



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 1833 of 2001

JAMBO BISCUITS (K) LIMITED PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED 1ST DEFENDANT

ANDREW DOUGLAS GREGORY 2ND DEFENDANT

ABDUL ZAHIR SHEIKH 3RD DEFENDANT

RULING

By way of re stating the brief background of this matter, this suit was filed by the plaintiff in November 2001. The amended plaint was principally seeking for declaratory orders that the debenture dated 5th November 1989, the joint and several debenture dated 22nd December 2000, the charge dated 5th November 1999 over a property known as **LR NOS 209/4249/3 and LR. 209/4249/4** be declared incurably defective null and void and an unenforceable. The plaintiff also sought for an order compelling the 1st defendant to return the title documents relating to those properties.

An Interlocutory application was heard and determined by Ringera J (as he then was). The application sought to restrain the 2nd and 3rd defendants from acting as receivers and managers of Jambo Biscuits Kenya Limited. By a ruling delivered on 17th January 2001, the 2nd and 3rd defendants were restrained from placing the plaintiff under receivership. The record shows other interlocutory applications were also filed and determined although they dealt with procedural and peripheral matters.

On 1st September 2009, the 1st defendant filed a notice of motion under orders XX1V r 6; order 50 r 1 of the Civil Procedure Rules and the inherent powers of this court. The applicant sought for the following orders.

1. The compromise dated 25th August 2008 entered into between the parties herein be recorded as a decree of the Court;
2. Pursuant to the said compromise the Plaintiffs's (by Original Action) suit against the Defendants

(by Original action) be dismissed.

3. There be judgment entered in favor of the Plaintiff (by way of Counterclaim) against the Defendants (by way of Counterclaim) in the sum of Ksh.150,000,000.00 with interest thereon at the rate of 16.75% per annum from 24th November 2008 until payment in full;

4. The plaintiff (by way of Counterclaim) be at liberty to execute the consequential decree in its favor by the sale by private treaty of the following properties registered in the name of the 1st Defendant (by counterclaim) and charged to the plaintiff (by way of counterclaim):

i. LR NO. 209/4249/3; and

ii. LR NO. 209/4249/4

5. The costs attendant to the said sale and of this application be borne by the defendants (by way of Counterclaim);

6. The Plaintiff (by way of Counterclaim) be at liberty to take out such further proceedings for execution for recovery of any balance as may thereafter remain outstanding on the decree;

7. This Honorable Court be pleased to make such other or further orders or directions as it may deem expedient in the circumstances.

The matters in support of this application are found in the supporting affidavit by **Neriah A. Okanga** sworn on 1st September 2009, the supplementary affidavit sworn on 10th September 2009, as well as the grounds in support of the application and the submissions by counsel for the plaintiff. Briefly summarized the 1st defendant filed a counter claim seeking the outstanding loan and the realization of the securities and guarantees executed by the plaintiff in favor of the 1st defendant. The basis of the present application is a **deed of settlement and compromise** which the parties negotiated during the pendency of this suit and it is dated 21st August 2008. That deed of Compromise and Settlement is drawn by the counsel of plaintiff and it is duly signed by all the parties to this suit. The deed provides under clause C:-

“without prejudice negotiations have however been held between Jambo, the Guarantors, Britania and Barclays and as a result the parties have agreed that the suit be settled for the sum of Kenya shillings one Hundred and fifty million (Ksh.150,000,000/-) (hereinafter called “The Settlement Sum”) payable to Barclays on the terms and conditions hereinafter appearing”

According to the deed of settlement, the plaintiff was supposed to pay to the 1st defendant a sum of Ksh.60 million within sixty (60) days from the date of execution of the deed of settlement. Indeed the plaintiffs’ counsel issued a professional undertaking to pay the sum of 60 million, which was duly honored and a banker’s cheque was paid to the 1st defendants counsel on 17th December 2008. There was part performance of the deed of settlement as per clause 1(b) which was duly honored by the respondents.

The plaintiff was supposed to pay the balance of 90 million within 180 days from the date of execution that is by February 2009 the plaintiff should have issued a professional undertaking to pay the balance of 90 million and in default clause 5 became operative.

Under clause 5 it is provided that:-

“In the event that Jambo, the Guarantors and Britania fail to perform their obligations under clauses 1(a) and (b) hereinabove, Barclays shall be at liberty to sell the Jambo Properties and the Britania Property at their respective best possible prices in the circumstances to recover the Settlement Sum or such balance thereof as may then be outstanding together with the interest thereon at Three per centum per annum (3% p.a.) above the base rate (presently 13.75% per annum) calculated from the expiry of Ninety (90) days from the date hereof together with the costs of conducting the said sale and

shall after recovery of the Settlement Sum together with interest and costs as aforesaid release to Jambo and discharge all the remaining securities set out in Recital D(i), (iv), (v), (vi) and (vii) hereinabove and any other securities not specifically set out herein (if any) together with any sum in excess of the Settlement Sum and interest and costs as aforesaid which may have been realized from such sale save that Barclays shall have recourse to the securities set out at Recital D(iv), (vi) and (vii) in the event of a shortfall.”

The payment of 60 million was realized from the sale of one of the properties charged to the 1st defendant. The 1st defendant allowed the plaintiff to sell the property on their own in order to realize the best price. What remains as security is LR NO. 209/4229/3 and 4 which the 1st defendant is entitled to sell in the event of default.

MR. Ohaga urged the court to grant the orders sought and allow the sale of those properties by way of private treaty to a buyer who has already been identified by Lloyd Masika Limited. The buyer is willing to purchase the property for 95 million which is the best price that can be obtained from the open market. The plaintiff/ respondents have also been trying to sell the property but they have not been able to do so. Counsel submitted that it will save costs if the properties are sold by way of private treaty to a buyer who has already been identified.

As regards the participation of the 2nd and 3rd defendants, Mr. Ohaga submitted that they have no interest in this matter. They were merely appointed as receiver managers. They were restrained from placing the company under receivership therefore they have no interest in the matter and were not necessary to include them in the counter claim.

On the part of the plaintiff/respondent, this application was opposed. Mr. Sarvia relied on the replying affidavit sworn by **Nitin Purshottam Dawda** sworn on 7th September 2009. The respondent challenges the application for intending to go further than what is contained in the deed of settlement, in particular the deed does not give liberty to the 1st defendant to come to court. It is only envisaged on clause 6 that once the parties have settled the matter a consent letter would be filed to mark the matter settled. There is no provision giving any of the party's recourse to court.

The deed of settlement cannot be converted to a judgment of the court. Moreover, under clause 5 the applicant cannot become entitled to sell the properties unless if the respondent was in default of both clause (a) and b. There is no default of clause (a) as 60 million was paid. Further the deed was not executed by the 2nd defendant in the original suit although the deed of settlement bound the 2nd defendant no documents are shown why he did not sign and the court cannot adopt a deed which is not executed by one party. Mr. Sarvia further argued that even if the court were to find the bank entitled to sell the property, it is incumbent upon the applicant to obtain the best price possible in the circumstances.

Selling the property to Montana developers for 95 million the applicant has not demonstrated that they have made any attempt to get the best price possible. Reference was made to a valuation report which was carried out by Lloyd Masika Limited in 2007 and the combined properties were valued for 280 million. The bank is now trying to sell the property for 1/3 of its value. On the request to enter judgment for 150 million this was challenged because 60 million was already paid without default. The only default was for 90 million which was due in February 2009. Therefore there cannot be any interest payable over 60 million. Counsel urged the court to allow the plaintiff to sell the property so that they can safely remove their machinery and equipment out of the site to avoid hardship and loss.

In the event the court were to allow the application, Mr. Sarvia was of the view that the sale should be controlled by the court by ordering valuations and settling the terms and conditions of the sale while bearing in mind the applicant is not deliberately defaulting but their efforts to redeem the account have been frustrated. They have approached several banks in an attempt to get a re financing and in all the banks they visit, they find former employees of the 1st defendant who block their request for loans.

This application is brought under the provisions of order XXIV r 6 (1) of the Civil Procedure Rules which

are couched in very clear terms as follows:-

“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 therewith.”

There is no dispute that a document called a deed of Compromise and Settlement was signed by the applicant and the respondents. The only issue raised by the respondent is that the 2nd defendant in the original action Andrew Douglas Gregory did not sign the deed of settlement. This was explained that the 2nd defendant was sued merely because they were appointed as receiver managers and they have no interest in this suit or in the deed of settlement.

I have considered the deed of settlement; it clearly places obligations between the applicant and the respondent. Andrew Douglas Gregory has no obligations; therefore his failure to sign the deed is of no consequence. Secondly, even if the deed did not specifically provide that the applicant will come to court to seek for judgment that does not bar the applicant from exercising their fundamental rights to seek legal remedies in the event of default. That is precisely why the Civil Procedure Provides rules provides that a party can come to court to seek an enforcement of a compromise arrived at through a lawful agreement such as this deed of compromise.

It is also not in dispute that the respondent complied with clause 1(a) and has admitted having defaulted to comply with clause 1(b). The respondents gives an explanation that they are looking for finances and in any event the court should control the process by ordering a valuation of the suit premises and by settling the terms and conditions of sale. I dare say the court is reluctant to re write contract for the parties which both the applicant and the respondent agreed on, the court will adhere to its role of interpreting the deed.

The default clause clearly provides what the applicant should do, that is, they are given liberty to sell the suit properties at the best possible prices to recover, the settlement sum. That is the order that the applicant will be entitled to, to sell the suit premises at the best possible price. The deed of settlement also compromised the plaintiff's suit against the defendant. The applicant sought for judgment to be entered for Ksh.150 million with interest at Court rates, it is clear that the respondent complied with clause 1 (a) and paid 60 million. What is outstanding is 90 million and the interest agreed upon as per the deed of settlement is 16.75% per annum from 25th August 2008 until payment.

Accordingly, judgment is entered for the plaintiff in the following terms;

1. The Deed of Compromise and Settlement dated 25th August 2008 is hereby made the order of the court.
2. Pursuant to the said Compromise the plaintiffs' suit (original suit) against the defendants is dismissed.
3. Judgment is entered in favor of the 1st defendant/applicant against the plaintiff (by way of counter claim) in the sum of 90 million with interest thereon at the rate 16.75% per annum from 25th August 2008 until payment in full.
4. The 1st defendant/applicant will be at liberty to sell LR NO.209/4249/3 AND 4 Nairobi at their respective best prices to recover the decretal sum.
5. The 1st defendant/applicant is awarded costs.

JUDGMENT READ AND SIGNED ON 6TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE