REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 122 of 2006

JOSEPH WAINAINA IRAYA T/A QUEEN CHICK INN…….....PLAINTIFF

VERSUS

H.E. DANIEL TOROITICH ARAP MOI …….....……1ST DEFENDANT

SHADRACK NGUGI KAMAU T/A BLACKIE AUTO SPARES…....2ND DEFENDANT

R U L I N G

This is an application by the Second Defendant under Rule 6(1) of the Civil Procedure rules for the following orders;-

- that the court do find that the plaintiff and the 1st defendant have compromised and adjusted this suit.

- that the said compromise and adjustment be recorded in these proceedings.

- that judgment be entered for the Applicant for Shs.1,000,000/- plus costs and interest.

The background to this application is that after the dismissal of the consolidated applications by the plaintiff and the second Defendant/Applicant against the 1st Defendant to restrain the latter from, inter alia, transferring, alienating, subdividing, selling or in any other way dealing with LR. No. Eldoret Municipality/Block 15/239 pending the hearing of the two suits filed by them, the 1st Defendant refunded to the plaintiff a sum of Kshs.6,000,000/- being part of the purchase price (and other incidental payments) which had been deposited with the 1st Defendant. This was done without any reference, consultation with or consent of the Second Defendant/Applicant herein.

As a result, the Applicant filed an application for an order that the plaintiff's advocate does not part with the said monies and for the plaintiff to provide security equivalent to the said sum pending the hearing and determination of the suit. After the court found that indeed a sum of Kshs.6,000,000/- had been paid to the plaintiff as a refund and that strictly, the second Defendant's claim was for Shs.1,000,000/-, this court directed that the plaintiff deposit a sum of Shs.1,000,000/- with his counsel or in the alternative provide security in the said amount pending the hearing and determination of the application. This order was complied with and the said application was to be heard on its merits.

However, before the said application was heard, the applicant has now made the present application dated 18th October, 2007. The plaintiff relies on purported agreement allegedly made on 12.2.07 between

the parties, including other persons not in this suit. The document is annexed and reads as follows;

”**12.2.07**

Meeting at Highlands Inn Hotel

Attendanc;-

Chairman – Simon Kimani

- **Samuel Muchai Kinyanjui**
- **Joseph Keriri**
- **Stephen Karobio**
- **Shadrack Ngugi**
- **Benson Chege**

Advocates – Nicholas Karira

Ngigi Mbugua

Resolutions

The parties paid the money to Mr. Moi in the following manner-;

Stephen Karobio – Shs.2,000,000/-

Benson Chege – Kshs.2,000,000/-

Joseph Wainaina – Kshs.2,500,000/-

The amount that has been refunded is Kshs.5.5 million thus leaving a balance of Kshs.1 million. Balance of Shs.1 million to be pursued from Mr. Sunkuli. The parties will share the amount of Kshs.1 million in equal shares. Stephen Karobio and Shadrack Ngugi will withdraw their cases against Josesph Wainaina.”

The plaintiff opposes the application and in effect denied that the said purported agreement amounts to a compromise or adjustment of the suit herein as between the plaintiff and the 2nd Defendant.

Order 24, Rule 6(1) of the Civil Procedure Rules provides as follows;

“6(1) where it is proved to the satisfaction of the court, and the court after hearing the parties, directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.”

In Black’s Law Dictionary, 7th Edition;- “Adjustment” is defined inter alia as;-

“……. To arrive at a new agreement with a creditor for the payment of a debt.”

And “Compromise is defined as;-

"1 An agreement between two or more persons to settle matters in dispute between them. 2. A debtor's partial payment coupled with the creditors promise not to claim the rest of the amount due or claimed."

From the foregoing definitions read together with Order 24 Rule 6(1), the burden of onus of proof that there has been an adjustment and/or compromise would be upon the Applicant. In this case I do not think that there can be an adjustment of the suit between the Second Defendant and Plaintiff since the claim is not one by a creditor against a debtor. The claim by the second Defendant against the Plaintiff and the 1st Defendant in the plaint dated 9th November, 2006 are for the following orders;

(i) An order of temporary injunction against the Plaintiff and 1st Defendant from dealing in the land in any way pending the hearing and determination of the suit.

(ii) An order of permanent injunction against 1st Defendant from dealing in the suit land in any way whatsoever.

(iii) An order against the Plaintiff that the land be shared equally among the parties in the verbal agreement and further the 2nd Agreement was entered in law under duress.

(iv) An order of specific performance against the 1st Defendant to part with possession and ownership to the land in favour of the plaintiff and the other buyers.

(v) Costs of the suit.

I do hereby note that there is still pending the application dated 21st February, 2007 for security in the sum of Shs.6,000,000/- which also includes a prayer for amendment of the second Defendant's plaint. In the draft proposed amended plaint there is an alternative claim as follows;

"v. In the alternative, the 2nd Defendant claims against the plaintiff for an order of refund of the amount that each party had made as deposit for the purchase of the land to the 1st Defendant and of which the 1st Defendant had refunded to the Plaintiff."

If the said prayer were part of the existing pleadings then it would have been capable of being "adjusted". However, the said application is still pending and the Second Defendant's claim remains that pleaded in his original plaint. The claim therein is capable of being compromised. The question is whether the purported agreement dated 12.2.2007 is a lawful agreement or compromise of the suit between the Plaintiff and the Second Defendant?

The "agreement" relied upon by the Second Defendant herein is neither a consent judgment or consent order which has been placed on record in this suit and adopted by this court. As a result, the facts in the case of **SPECIALISED ENGINEERING COMPANY LIMITED V.S. KENYA COMMERCIAL BANK LIMITED (1988)** KLR 150 are different from the facts of the present case. In this case, the "agreement" referred to was entered into between the advocates for the plaintiff and the second Defendant together with the Plaintiff second Defendant and 5 other persons who are not parties in this suit. The "agreement" was hand-written and made in a hotel, a social setting. It was not in the Chambers of either of the two advocates. There are no minutes to show the deliberation.

This court is being called upon to find and declare that the said "agreement" amounted to an agreement between the parties in this suit to settle the matters in dispute between them. Since it is not a Consent Judgment or Consent Order and/or adopted by the court or even on the official letter-heads of counsel on record, this court must act with extreme care and caution in the interpretation of the contents of the said document. The agreement must be clear, certain and devoid of any ambiguities or otherwise in its wording and meaning. The intention and meeting of the minds must jump out from the face of the record. Also, I think, it ought to be shown and proven that in reliance upon the said "agreement" which is

not on record and adopted the applicant acted in reliance upon the same, and materially changed his position in such a way that if the agreement was not honoured he would suffer prejudice or loss as a result of the said reliance.

The Second Defendant/Applicant claims that the "agreement" is proof that he contributed a sum of Shs.1,000,000/- towards the purchase price and he wants judgment be entered against the plaintiff in the said sum and be paid from the refund of Shs.6,000,000/- made by the 1st Defendant. However, in the agreement there is no mention of the Second Defendant as a contributor. In the agreement, it is said that the monies paid to Moi were as follows;

Stephen Karobio – Kshs. 2,000,000/-

Benson Chege – Kshs.2,000,000/-

Joseph Wainaina – Kshs.2,000,000/-

The only reference to the Applicant Shadrack Ngugi is that he would withdraw his case against the Plaintiff. It is therefore not clear to this court at this stage whether the Second Defendant indeed contributed Shs.1,000,000/-. In any case this is not discernible from the said "agreement."

The Second Defendant has also not shown whether he relied on this agreement since it was entered into and if so whether he did so to his detriment. He has not shown that he still cannot pursue the said claims within this suit as it is or in an possible amended plaint due to the existence of or his acting upon the alleged "agreement."

The other issue which brings uncertainly and complication in this application is the involvement or role of the 5 persons who signed the agreement but are not parties. Who are the following people and what is their role in this suit?

- Simon Kimani

- Samuel Muchai Kinyanjui

- Joseph Keriri and

- Stephen Karobio

- Benson Chege?

They are not parties to this suit yet if the agreement is found to be a compromise, adopted by this court and entered wholly or partially as judgment, can the same be enforced against any of them? I do not think so. Of equal importance is that suppose one of the alleged two other contributors to the purchase price who are not parties are aggrieved by the judgment in favour of the Applicant what would happen? How can their grievances be heard yet they are not parties in this suit?

It is due to the aforesaid anomalies and uncertainities that I am not satisfied that there is a bonafide and valid compromise as envisaged by Halbury's Laws of England 3rd Edition, page 403 paragraph 756 of Volume 30 which states the Common Law position i.e;-

"All or any of the questions in dispute in any action my be settled between the parties by compromise without trial, and if such compromise is bonafide and validly entered into, the court does not allow the question so settled to be again litigated between the parties to the settlement."

If an alleged compromise therefore is not recorded and/or adopted by the court within the proceedings/record, then I think that the standard of proof would be strict, if not higher, particularly where the alleged compromise was done in circumstances which suggest informality and casualness. In

this case, the purported agreement was not even made through formal communication of counsel or on their stationery. Compromise of a suit is a serious and solemn affair and must be treated as such to ensure efficacy and enforceability. The ideal compromise is that recorded and adopted by the court.

Last but not least, the compromise is deemed to be a settlement of the question in dispute between the parties. As a result, the pleadings on record must be the road map for the issues compromised. To introduce extraneous issues, parties etc outside the pleadings is to introduce uncertainty and potentiality of future disputes. This must be discouraged.

I therefore do hereby dismiss the Second Defendant's application with costs to the Plaintiff.

Dated and delivered at Eldoret on this 21st day of January, 2008.

M.K. IBRAHIM

JUDGE