



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 77 of 2006**

**CITY FINANCE BANK LIMITED .....PLAINTIFF**

**VERSUS**

**CAROLINE WANJIHIA .....DEFENDANT**

**RULING**

The applicant **Caroline Wairimu Wanjihia** is an advocate of the High court of Kenya trading under the name and style of **C. W. Wanjihia & co.** advocates. She has been sued by the plaintiff/respondent herein for a sum of Kshs.4,359,259.50 together with interest thereon at the rate of 27% per annum from 1<sup>st</sup> January, 2006. On 20<sup>th</sup> April, 2006 the applicant/defendant was served with summons to enter appearance and a copy of the plaint. The defendant did not enter appearance and no defence was filed. And as a result the plaintiff applied for exparte judgement to be entered against the defendant and on 11<sup>th</sup> July, 2006 judgement was entered against the defendant for the sum prayed in the plaint. And subsequently a decree was obtained by the plaintiff against the defendant on 12<sup>th</sup> September, 2006. According to the decree the defendant was ordered:

- (1) To pay a sum of Kshs.4,359,259.50 interest thereon at 27% per annum from January, 2006 until payment in full.**
- (2) To pay the plaintiff the costs of this suit to be taxed and certified by the taxing master of the court.**

The plaintiff's advocate thereafter filed a bill of costs and the costs was taxed for the sum of Kshs.154,380.60 and the advocate was issued with a certificate of taxation dated 28<sup>th</sup> March, 2007. The plaintiff thereafter instructed **M/S Keysian Auctioneers** who took out warrants of attachment and sale dated 11<sup>th</sup> March, 2008 issued by this court. And on 19<sup>th</sup> March, 2008 Keysian Auctioneers proclaimed and/or attached the goods of the defendant and now defendant has filed chamber summons dated 31<sup>st</sup> March, 2008 seeking;

- 1. That this Honourable court do order that the suit has been adjusted wholly by compromise in that the defendant has fully satisfied the plaintiff's claim and consequently endorse the aforesaid compromise on the record to mark the matter as settled.**
- 2. In the alternative this Honourable court do order the plaintiff to furnish a statement of account for all monies paid by the defendant towards regularizing the loan/overdraft account and thereafter make appropriate orders in respect of the decree herein.**

**3. That the proclamation herein by Keysian Auctioneers on 19<sup>th</sup> March, 2008 is bad in law and therefore null and void.**

It is clear that by a letter dated 23<sup>rd</sup> March, 2004 the defendant applied for loan facility of Kshs.1.5 million which was granted through a letter dated the same date. The defendant fell into arrears making the plaintiff to write several demand letters. However, the defendant did not regularize her loan account prompting the plaintiff to file the present suit for Kshs.4,359,259.50 together with interest thereon. No doubt that the plaintiff obtained judgement against the defendant and decree issued therefrom. It is also clear that the defendant entered into negotiations with the plaintiff whereby the plaintiff offered the defendant on without prejudice basis to settle the dispute on agreed sum of Kshs.3.5 million.

The defendant relies on the contents of the letter dated 16<sup>th</sup> October, 2006. The terms of the said letter which was written by the bank is as hereunder:

**“YOUR CREDIT FACILITY WITH US**

***We refer to the correspondence resting with your letter dated 8<sup>th</sup> September, 2006 addressed to Singh Gitau Advocates and copied to us.***

***We also refer to the meeting we had in our offices this morning.***

***We had agreed to accept an amount of Kshs.3.5 Million (Kenya shillings three Million five Hundred Thousand only) as full and final settlement in the account. This amount will be payable as follows: -***

- (i) Immediate payment of Kshs.75,000/=***
- (ii) Banker’s order for monthly payment of Kshs.75,000/= for the next 7 months***
- (iii) Full balance amount of Kshs.2.9 million to be paid at the end of the 8<sup>th</sup> month.***

***We accordingly acknowledge receipt of your cheque number 000100 dated 16<sup>th</sup> October, 2006 for Kshs.75,000/=.***

***Please arrange to send us your Banker’s order agreeing to pay Kshs.75,000/= per month for the next 7 months”.***

There is no evidence to show that the defendant accepted the plaintiff’s offer though there is evidence to show that the defendant made several payments. However, it is clear that the defendant defaulted on the required payments and at the time the proclamation was made a sum of Kshs.900,000/= was paid. It is the contention of the plaintiff that by virtue of default it was entitled to full payments as further decreed and that it was entitled to execute for the entire full amount less any money paid. It is clear that when the defendant learnt that execution process was put in place she forwarded a postdated cheque of Kshs.1 million to which the plaintiff’s advocate allegedly accepted on account and without prejudice basis. It is also clear that the defendant thereafter issued a cheque for Kshs.1.5 million. The question that arises in this matter is whether a party who has a valid judgement can be made to forego and/or abandon the execution process. As stated earlier the defendant has not made any attempt to file a defence and even in this application there is no indication that the defendant is willing or is desirous to challenge the decree obtained by the plaintiff. The decree has not been satisfied and the evidence available shows that there are some monies to be paid by the defendant.

In my understanding a judgement is conclusive between the parties and is conclusive evidence against all the world of its existence, date and legal consequences. It is also my position that it is possible for all or any of the questions in dispute in an action to be settled between the parties by way of compromise without a trial. However, it is important to establish that the alleged compromise is bona fide and validly entered into by the parties. It is also important to appreciate that a court of law should not and cannot

allow the questions so settled to be again litigated between parties to the settlement. In this case the main controversy between the parties is whether the letter dated 16<sup>th</sup> October, 2006 amounts to a compromise and whether the said letter can override the judgement and decree obtained by the plaintiff. I agree that a compromise or settlement can override or overtake a judgement or decree of the court with the consent of the parties. The position here is that;

- (1) The letter dated 16<sup>th</sup> October, 2006 was made by the plaintiff to the defendant on a without prejudice basis. That notwithstanding, the defendant was required to fulfill certain terms and conditions set out in the said letter which are;
- (2) That the defendant was required to accept and adopt wholly the contents of the letter.
- (3) The defendant was required to make an immediate payment of Kshs.75,000/=
- (4) The defendant was also required to make a banker's order for monthly payments of Kshs.75,000/= for the next 7 months from October, 2006.
- (5) The defendant was also required to pay full balance of Kshs.2.9 million at the end of the 8<sup>th</sup> month.

It is clear at the time the current dispute arose, the plaintiff had only paid a sum of Kshs.900,000/= . It is also clear that the defendant did not make a banker's order for monthly payment of Kshs.75,000/= from November, 2006 to May, 2007. The legal consequence in such a conduct is that the defendant default on her payment and her failure to accept the terms of the letter dated 16<sup>th</sup> October, 2006 precluded the plaintiff to abide by the terms of the said letter.

The plaintiff had in its possession a valid judgement and in my humble view a party entitled to the benefit of a judgement cannot be made or deemed to have abandoned the benefit of the ex parte judgement. No evidence can be allowed to contradict the record of this court and where a judgement is clear as to its terms anything done by the parties is subsequently and which is not in consonant with the terms of the judgement is invalid. The point I am making is once the plaintiff has sued the defendant and has obtained judgement and there is nothing to show that the judgement has been varied or set aside the legal consequence it is valid and remains unsatisfied. The foundation of any application to interfere that valid judgement must arise from the pleadings. And in my humble view there is no foundation and/or basis to interfere with the judgement obtained by the plaintiff. The validity of the judgement is not contested and therefore anything contrary or in contravention of the said judgement is misconceived. It is for that reason that I make a finding that application by the defendant is misconceived and it is hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of May, 2008.

**M. A. WARSAME**

**JUDGE**