



**Equip Agencies Limited & another v I & M Bank Limited (Commercial Case 417 of 2018) [2023] KEHC 18550 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 417 OF 2018  
DAS MAJANJA, J  
JUNE 16, 2023**

**BETWEEN**

**EQUIP AGENCIES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**GILGIL TREATMENT INDUSTRIES LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**I & M BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Defendant has moved the court by the Notice of Motion dated November 11, 2023 seeking the following order that:
  - (1) This suit be marked as settled in terms of a Ruling dated September 30, 2022 in HCCC No 87 of 2019; *Equip Agencies Limited v I & M Bank Limited & 2 Others* which judgment adopted the terms of the Deed of Settlement dated June 10, 2021.
2. The application is supported by the affidavit of the Defendant's Officer, Andrew Muchina, sworn on November 11, 2022. are three applications before the court for determination.

It is opposed by the 1<sup>st</sup> Plaintiff through the affidavit of its director, Divyesh Indubhai Patel sworn on December 14, 2022. Both parties have filed written submission in support of their written submissions.
3. It is common ground that 1<sup>st</sup> Plaintiff, the Defendant and its directors and related companies entered into a Deed of Settlement dated June 10, 2021 resolving to settle the several suits among them HC COMM No 417 of 2018 cited at clause 6(a) thereof.
4. In consideration, the Defendant would waive interest on the debt due to it and which debt was secured by several securities, inter alia, Gilgil Township Block 2/210, LR No MN/VI/3075



Changamwe, Mombasa, LR No 209/8755 and LR No 209/4535, Nairobi. The 1<sup>st</sup> Plaintiff, its related companies and its directors would pay a discounted sum of Kshs 875,000,000.00 in instalments; Kshs 100,000,000.00 within 15 days of execution of the Deed, Kshs 50,000,000.00 within 120 days from the date of execution of the Deed and then Kshs 725,000,000.00 within 180 days from the date of execution of the Deed. Upon receipt of the settlement amount, the Defendant would then discharge the securities and the parties would record consents marking the pending suits as settled.

5. Following the settlement, the Defendant filed an application in HC COMM No 87 of 2019, *Equip Agencies Ltd v I & M Bank Ltd and Others* seeking a raft of orders including an order that suit against the Defendants be marked as adjusted wholly and/or compromised in terms of the Deed of Settlement. After hearing the matter, I delivered a ruling dated September 30, 2022 in which I made the following order:

(b) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Notice of Motion dated June 7, 2022 is allowed on terms that judgment is entered for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on terms that this suit is marked as settled in accordance with terms set out in the Deed of Settlement dated June 10, 2021.

6. The thrust of the Defendant's application is that the issues in this case are already covered by the Deed of Settlement and that no purpose will be served by maintaining the suit other than to mark the suit as settled.

7. The 1<sup>st</sup> Plaintiff opposes the application on the ground that suit is far from settled in accordance with Clause 1.5 of the Deed of Settlement which states as follows:

"Clause 1.5

Upon confirmation of the receipt by the Chargee of cleared funds equivalent to the Settlement Amount on the due date, the Charge shall immediately thereupon cause such action to be executed as may be required to:

- a. Discharge the various securities forthwith with costs relating to the discharge of the securities to be borne by Borrower, Chargor and Mortgagor.
- b. Record Consents in the High Court, Court of Appeal and Supreme Court to mark as settled, all pending cases particularized in Clause 6(a) to (m) above in accordance to the terms of this settlement deed and that this deed be filed as an order of the court."

8. The Plaintiff argues that the aforesaid clause is couched in mandatory terms hence the suit can only be withdrawn or marked as settled once the security properties are discharged and the settlement amount had been confirmed as received. It urges the court to enforce the Deed on its terms and insist the securities be discharged first.

9. The Plaintiff contends that the application in this case is an afterthought as it brought after undue delay when the suit is ready for hearing. It avers that the Deed of Settlement is being challenged in HC COMM E943 of 2021, *Equip Agencies Ltd v I & M Bank Ltd and Another* and in the Court of Appeal in Civil Appeal No E316 of 2022 hence the application is premature. Likewise, the decision in HC COMM No 87 of 2019 is the subject of appeal and proceeding with this matter would lead to confusion and embarrassment should the appeal be successful. The Plaintiff also avers that the application is res judicata as the court dismissed similar prayers in HC COMM No 87 of 2019.

10. I have considered the parties' arguments in the matter and I take the following view. The parties in this case have entered in to a Deed of Settlement. As the Plaintiff points out, the court has a sacred



duty to enforce a bargain freely entered into by parties. As the Court of Appeal stated in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* NBI CA Civil Appeal No 35 of 1999 [2001] eKLR, “A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.” In this case, the Plaintiff as not pleaded any grounds that would entitled them to avoid a valid agreement nor provided evidence in their deposition to support such a claim.

11. In addition, the Plaintiff has made an effort to comply with terms of the Deed of Settlement by paying the first installment of Kshs 100,000,000.00 but has defaulted. These facts were recognized in the ruling dated June 2, 2022 in HC COMM E943 of 2021 where the court dismissed the Plaintiffs’ application for injunction seeking to restrain the Defendant from selling the secured properties.

12. Despite the argument made by the Plaintiffs, the fact remains that issues in this suit between the parties have been compromised by the Deed of Settlement. The Defendant’s application is premised on Order 25 Rule 5(1) of the *Civil Procedure Rules* which provides that:

"25 (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.

(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."

13. The aforesaid provision empowers the court to record a lawful compromise of the suit reached by the parties. In this case, the compromise has been reached and recorded in the Deed of Settlement as this suit concerns the subject facilities and the suit property covered by the Deed of Settlement. Clause 1.8 as follows:

"1.8 The Chargee, Borrower, Chargor and Mortgagor agree that this Deed of Settlement is in full and final settlement of all disputes arising in the pending cases particularized in Clause 6(a) to (m) and that neither party shall have any claim against each other, now or in the future in respect of any matter whatsoever arising out of the various lending agreements executed, the suit filed in court, the mortgages and debentures or any other matter whatsoever and for this purpose the parties bind themselves, upon fulfilment of the terms set out in clause 1.4, to file appropriate process in the aforesaid suit.

14. The aforesaid clause could not be clearer that the Deed of Settlement is in full and final settlement of all disputes regarding the subject matter which includes this suit which is listed at clause 6(a). I therefore find that the suit between the 1<sup>st</sup> Plaintiff and the Defendant was duly compromised and this court is duly bound to enforce the agreement of the parties by recording the appropriate order.

15. The purpose of the recording the settlement is to enable the parties now pursue their right under the Deed of Settlement which disputes include the issues that Plaintiff is now raising on whether Plaintiffs or Defendants have complied with the terms thereof including the discharge of securities, the amount due and whether demand of such amount violates the legal ceiling placed by sections 44 and 44A of the *Banking Act*.



16. Further, the Deed of Settlement covers specifically covers this case hence the ruling in HC COMM No 87 of 2019 and the effect thereof is not relevant to this case. In my view, the Deed of Settlement, being an agreement concerning this case, is to be enforced on its own terms. It was not therefore necessary for the Defendant to make reference to that ruling in that suit. It is therefore the duty of this court to give effect to the intention of the parties by enforcing the compromise reached by the parties.
17. I therefore order as follows:
- a. The notice of motion dated December 11, 2023 is allowed on terms that judgment be and is entered for the defendant against the 1<sup>st</sup> plaintiff on terms that this suit is marked as settled in accordance with terms set out in the deed of settlement dated June 10, 2021.
  - b. The costs of the application shall be in accordance with the deed of settlement.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr King'ara instructed by Gichuki King'ara and Company Advocates for the Plaintiffs.

Mr Wawire instructed by Wamae and Allen Advocates for the Defendant.

