



**Gilgil Treatment Industries Limited v I & M Bank Limited & another (Commercial Case 418 of 2018) [2023] KEHC 18551 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18551 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 418 OF 2018  
DAS MAJANJA, J  
JUNE 16, 2023**

**BETWEEN**

**GILGIL TREATMENT INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**I & M BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EQUIP AGENCIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> 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. The Plaintiff opposes the application through the Notice of Preliminary Objection dated March 1, 2023 and the replying affidavit of its General Manager, James Njuguna Burugu, sworn on March 14, 2023. It is also opposed by the 2<sup>nd</sup> Defendants through the undated affidavit of its director, Divyesh Indubhai Patel. The parties have filed written submission in support of their written submissions.
3. It is common ground that the 1<sup>st</sup> Defendant on the one hand and 2<sup>nd</sup> Defendant and its directors and related companies entered into a Deed of Settlement dated June 10, 2021 resolving to settle several suits including this suit; HC Comm No 418 of 2018. In consideration, the 1<sup>st</sup> 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> Defendant, 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 1<sup>st</sup> Defendant would then discharge the securities and the parties would record consents marking the pending suits as settled. Among the suits which are listed in the Deed of Settlement is the present suit cited in clause 6(b).

4. Following the settlement, the 1<sup>st</sup> Defendant filed an application in HC Comm No 87 of 2019 Equip Agencies v I & M Bank, John Gikonyo t/a Garam Investments Ltd and Gil Gil Total Investors Self Help Group, 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.

5. The thrust of the 1<sup>st</sup> 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.
6. The Plaintiff raises the principal objection to the application on the ground that it was not privy to the contract between the Plaintiff and the 1<sup>st</sup> Defendant hence the Deed of Settlement cannot be enforced against it. Further, it was not a party in HC COMM No 87 of 2018 hence the ruling in that case cannot bind it in this case.
7. It is correct to state that the Deed of Settlement is between the 1<sup>st</sup> Defendant, I & M Bank, on the one hand and the 2<sup>nd</sup> Defendant, Equip Agencies Limited, together with Divyeshkumar Indubhai Patel, Vineshkumar Indubhai Patel and Grishmakumari Indubhai Patel, Unicom Limited and Interactor Company Limited on the other hand. The doctrine of privity of contract is fundamental in the law of contract thus in *Agricultural Finance Corporation v Lengetia Ltd [1985] KLR 765*, the Court of Appeal (Hancox JA) cited with approval *Halsbury's Laws of England, 3<sup>rd</sup> Edition, Volume 8*, paragraph 110, the following passage summarizing the statement of law:

As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.

8. Since the Plaintiff is neither party to the Deed of Settlement and HC COMM No 87 of 2018, this suit cannot be settled in terms of the Deed of Settlement or in terms of the decision of the court in a case to which it was not party. Although the 1<sup>st</sup> Defendant has stated in the grounds on the face of the application that the suit does not disclose a cause of action, is scandalous, frivolous or vexatious and may prejudice, embarrass or delay the fair trial of the action, it has not invoked the provision of Order



2 rule 15 of the *Civil Procedure Rules* to strike out the suit on those grounds. The Plaintiff is therefore denied the opportunity to demonstrate the contrary.

9. For the reasons I have set out above, I need not consider the other grounds raised by the 2<sup>nd</sup> Defendant as this is the Plaintiff's suit which I decline to terminate in the manner proposed by the 1<sup>st</sup> Defendant.
10. The 1<sup>st</sup> Defendant's application dated November 11, 2022 is dismissed with costs to the Plaintiff and the 2<sup>nd</sup> Defendant.

**DATED and DELIVERED at NAIROBI this 16th day of JUNE 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango**

**Ms Gichuki instructed by Gichuki Kimere and Company Advocated for the Plaintiff.**

**Mr Wawire instructed by Wamae and Allen Advocates for the 1<sup>st</sup> Defendant.**

**Mr King'ara instructed by Gichuki King'ara and Company Advocates for the 2<sup>nd</sup> Defendant.**

