



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 2 OF 2018

KIKAMBALA HOUSING ESTATE LIMITED.....PLAINTIFF

VERSUS

KHANNA ADVOCATES & BANK OF AFRICA KENYA LIMITED.....DEFENDANT

DIRECTIONS

1. Every time this matter comes before me, the words of the plaintiff director, one Mr. Osman ERDINC ELSEK, when he first appeared before me, to the effect that **he does not trust any lawyer in Kenya** keep ringing in my ears. However, as the matter progressed I got the impression that mediation had done a magic because a partial settlement was achieved in days after reference to the court annexed mediation.
2. My elation was however short-lived because parties have to date, some nineteen months later, not fulfilled the terms of the partial settlement. That spirit was dampened further when the parties upon engaging an auditor to settle the question of accounts between them could not agree on the report and when sent back before the mediator, reached a tentative agreement, according to the plaintiff but the defendant representative, not Mr. McCourt, flatly refused to sign the same even though the plaintiff is said to have signed their part. The state of affairs appears to have concerned the two counsel and propelled them to attend court in person and ask the court to give directions on way forward.
3. In their address to the court, Mr. McCourt Counsel for the Defendant took the position that the parties are unable to move forward due to the plaintiffs failure to comply with the terms of the partial agreement while the plaintiff counsel Mr. Mkan takes the position that the matter had been substantively settled if not for failure by the defendant to sign the last and final agreement reached before the mediator. These directions are therefore sought by the said submissions and reflects what the court considers would best move the matter forward and towards conclusion.
4. In coming up with these directions, I have reminded myself that the partial agreement became a court order but one founded upon agreement between the parties at mediation hence the court has no part to play in it save to have it enforced. I have equally reminded myself to remind the parties and counsel that the Court Annexed Mediation is a judicial process aimed at helping court meet its mandate to the people of Kenya while striving to restore relationships and that parties have a duty to court to treat such process with all the seriousness court processes and directions need to be taken.
5. I consider it a value that must be circumscribed to every judicial process that the law and court orders ought to and must be adhered to and wherever we attempt to depart or abandon such adherence a grave peril must stare at us and unto our conscience.
6. By the partial agreement dated the 11/06/2018, parties voluntarily and with the assistance of a person I consider a very able mediator agreed as follows:-

THE PARTIES HEREIN DO AGREE AS FOLLOWS

A. BOA has demanded from KHEL K.shs.364,000,000/- (Kenya Shillings Three Hundred Sixty Four Million Only) as disputed Principal Amount together with interest which has also been disputed by KHEL subject to the BOA bank account statements of KHEL and Elsek and Elsek Kenya Limited being audited by an Independent Auditor to be appointed by the both parties and report submitted on the new Principal Amount within 90 days. Failing agreement on appointment of the Auditor by the parties, the Independent Auditor to be appointed by the Court.

B. KHEL agrees to sign the Surrender instrument and the Lease of the Suit Property so as to enable release of Lease Certificate and registration of subsequent Subleases of their 125 (One Hundred Twenty Five) houses which are fully paid.

C. KHEL agrees to charge the Lease Certificate in favour of BOA for the disputed Principal Amount by KHIEL of Kshs.364,000,000/= (Kenya Shillings Three Hundred Sixty Four Million Only) and both Parties have agreed to amend the charge on the Lease Certificates but after the return of a new Principal Amount by the Auditor not later than 90 (Ninety) days after receipt of the new Principal Amount as stated in clause A above.

D. BOA will execute a partial discharge in respect to the 125 units which KHEL has already sold and received full payment for.

E. KHEL and BOA do agree that the remaining 183 houses (One Hundred Eighty Three Only) will not be sold until the dispute on the interest demanded by BOA and losses demanded by KHEL due to delay in issuance of the Leasehold Title Deed is decided by court in Mombasa HCCC 58 of 2015 and by Mombasa HCCC 2 of 2018..

F. All Parties will file consents in the formats contained in this Agreement as Appendix A agreed by the parties in Malindi ELCC 207 OF 2015 (consolidated with Malindi ELCC 61 OF 2015, Malindi ELCC 227 of 2015, Malindi ELCC 234 of 2015, Malindi ELCC 266 of 2015, Malindi ELCC 16 of 2015), Malindi ELCC 355 of 2015, Mombasa HCCC 58 of 2015 and Mombasa HCCC 2 of 2018”.

7. In my assessment and appreciation of facts then and now, the only issue that would remain outstanding after the consent is effectuated will be how much is the debt between the parties as a lender and a borrower, in addition the two issues isolated in the agreement.

8. From the onset, it appears to me that the parties and the court have for sometime now paid less regard to the need to enforce compliance with the agreement reached between the parties. Compliance ought to be made. In order that it be done, I note that parties have taken time and judicial resources to have a joint audit report of the accounts between them prepare, I direct that:-

- a. The Plaintiff complies with the terms of the agreement in clause B, C and E and does so within 30 days from today.**
- b. The defendant complies with its obligations in terms of clause D forthwith and not later than the 30th day from the date of these directions.**
- c. Parties to file the consents in the suits referred to in Clause F forthwith and not later than 30 days from today.**
- d. For avoidance of doubt if any clause has been complied with by the date of these directions there shall be no need to re-comply.**
- e. It being appreciated that the dispute between the parties would be substantially narrowed down after compliance and adoption of the joint audit report, I pursuant to Rule 9 of the ‘Judiciary of Kenya’, practice directions on court annexed mediation, dated 8/5/2017 as amended by Gazette Notice No. 7263 of 2018, direct that the parties shall within 30 days from today attend further mediation for the mediator to lodge his report in court within 40 days from today.**
- f. Noting that the two parties have been less than candid with the court in one way or the other, I direct and remind them that the timelines herein set shall be of essence and failure to comply with invite sanctions.**

Dated, signed and delivered at Mombasa this 3rd day of February 2020.

P.J.O. OTIENO

JUDGE