



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 248 OF 2006**

**CHEVRON KENYA LIMITED.....APPLICANT**

**(Formerly CALTEC OIL KENYA LIMITED)**

**-VERSUS-**

**MUVIR HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**(by original action)**

**AND**

**MUVIR HOLDINGS LIMITED .....PLAINTIFF**

**VERSUS**

**CHEVRON KENYA LIMITED..... 1<sup>ST</sup> DEFENDANT**

**(Formerly CALTEX OIL KENYA LIMITED)**

**TOTAL MARKETING KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**TOTAL KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1) On 3<sup>rd</sup> October 2018, Mr. Thangei learned advocate for the 3<sup>rd</sup> defendant in the main suit, informed this court that the 3<sup>rd</sup> defendant and the 1<sup>st</sup> defendant, the decree holder herein, have negotiated and reached at a settlement agreement. Mr. Thangei, urged this court to mark this matter as settled. Mr. Kihara learned advocate for the 1<sup>st</sup> defendant raised an objection arguing that he was not involved and that he did not have a copy of the settlement agreement.

2) Mr. Kinyanjui, learned advocate co-appearing with Mr. C. N. Kihara for the 1<sup>st</sup> defendant confirmed to this court that he had received part of the settlement payment. Upon hearing brief submissions from learned counsels, this court adjourned the matter and directed Messrs Thangei, Kihara and Kinyanjui to have a discussion and explore an amicable resolution on the settlement agreement reached by the parties.

3) When the matter came up for mention on 22<sup>nd</sup> October 2018, Mr. Thangei informed this court that so far the 3<sup>rd</sup> defendant had deposited with the firm of Kinyanjui & Njau Advocates a sum of ksh.110,000,000/= pursuant to the settlement agreement.

4) Mr. Kihara on his part clearly indicated that he was going to raise an objection because the party and party costs was not factored in the settlement agreement hence the same should not be adopted as the order of this court. He argued that an advocate has a lien over the money for the advocates fees. Mr. Kinyanjui pointed out that the settlement agreement is in respect of ksh.120 million leaving a balance of kshs.10 million unpaid therefore the decree cannot be said to be fully settled.

5) On 9.11.2018 Mr. Thangei further informed this court that the 3<sup>rd</sup> defendant has undertaken to pay the balance of ksh.10m within 28 days.

- 6) Upon realizing that the parties are unable to agree on the way forward over the settlement agreement, this court gave directions in which learned counsels were invited to file and exchange affidavits plus written submissions to assist this court determine whether or not to mark the matter as settled by adopting the settlement agreement.
- 7) I have considered the facts deponed in the rival affidavits plus the written submissions. It is the submission of Mr. Thangei that Muvir Holdings Ltd, and Total Kenya Ltd being the 1<sup>st</sup> and 3<sup>rd</sup> defendant respectively reached at and executed a settlement agreement dated 14<sup>th</sup> August 2014 which is annexed to the affidavit of Boniface Abala. The learned advocate further pointed out that the directors of Muvir Holdings Ltd namely James Irura Kagwamba and Reuben Gachau Mwhiki did not challenge the validity of the agreement. It is also said that Mr. Kihara in his replying affidavit did not also challenge the validity of settlement agreement and therefore he cannot purport to do so using submissions.
- 8) Mr. Thangei also pointed out that Mr. Kinyanjui had expressly stated that there was nothing wrong if the parties negotiated and reached at an agreement without involving their advocates. Mr. Thangei also argued that the 1<sup>st</sup> defendant having executed the agreement is now estopped from challenging the same to which it has so far received a sum of ksh.120million.
- 9) It was submitted that upon the execution of the agreement and on the representations made to Total Kenya Ltd by Muvir Holdings Ltd, that the matter had been fully settled, Total Kenya Ltd withdrew C.A no. 76 of 2018. This court was urged to find that the settlement agreement is valid and binding on the parties.
- 10) The other aspect which featured prominently is the issue touching on costs. It is the submission of the 3<sup>rd</sup> defendant that Clause 4 of the settlement agreement provides that upon the execution of the agreement parties agreed to lodge a consent in court to dismiss the proceedings with no order as to costs and therefore the 1<sup>st</sup> defendant is not entitled to claim costs. In short, the 3<sup>rd</sup> defendant is of the submission that costs were waived.
- 11) Mr. C. N. Kihara, learned advocate for the 1<sup>st</sup> defendant stated that he had two certificates of costs which also carry an interest at 14% from 17<sup>th</sup> December 2015 until the date of full payment. The learned advocate put the entire party and party costs together with the accrued interest as at 17.12.2019, a global figure of ksh.19,068,309/72. Mr. Kihara pointed out that the 3<sup>rd</sup> defendant was all along aware that his law firm had a lien over the decretal sum in addition to the awarded, and taxed costs, for its unpaid advocates-client costs and also party and party costs as they comprise of the profit costs subject to the two certificates of costs.
- 12) It is the submission of the learned advocate that the settlement agreements lacks bonafides and is deceitful of the interests of the 1<sup>st</sup> defendant. It is also argued that there is no explanation as to why learned counsels were not involved in the process of negotiating and reaching at the settlement. Mr. Kihara further pointed out that the agreement was not signed by all the parties nor did the negotiations involve all the parties to the case neither does it exhaust all the outstanding issues. It was also pointed out that the agreement does not make any reference to the taxed costs and certified party and party costs.
- 13) The 1<sup>st</sup> defendant further stated that the agreement does not comply with the provisions of the Companies Act and the Articles of Association concerned as it is not executed by the required two directors for either party.
- 14) It is also contested that the agreement is vague and does not categorize the costs it is referring to. It is said that the 1<sup>st</sup> defendant's representative who signed the settlement agreement has denied the assertions of the 3<sup>rd</sup> defendant that the party and party costs were traded off and are not payable.
- 15) Mr. Kinyanjui who is co-appearing with Mr. Kihara for the 1<sup>st</sup> defendant submitted that it was agreed that the judgement debtor would pay ksh.120 million in a final settlement. Mr. Kinyanjui further opined that there is nothing wrong if parties negotiated and even reached at a settlement excluding their lawyers. Mr. Kinyanjui pointed out that there appears to be a problem as to party and party costs in that they were not included in the settlement agreement. The learned advocate also stated that a client cannot negotiate fees on behalf of its advocate.
- 16) Having considered the rival submissions, it is clear that there are important matters which were not captured by the settlement agreement. The most serious issue which was given prominence by the learned advocates is the question touching on party and party costs. The parties seem not to seriously contest the making of the agreement. I have already stated that Mr. Thangei is of the submission that the 1<sup>st</sup> defendant waived its claim on costs when it executed the settlement agreement.
- 17) It is said that Clause 4 of the settlement agreement bound the 1<sup>st</sup> defendant from claiming costs. Messrs Kihara and Kinyanjui are of the contrary view that the issue touching on costs was not addressed.
- 18) With respect, I agree with the submissions of Mr. Kihara that the settlement agreement is vague when it comes to party and party costs. It does not specifically state that party and party costs are waived by the 1<sup>st</sup> defendant. I also agree with the submissions of Mr. Kinyanjui that party and party costs were not included in the settlement agreement. It cannot therefore be said that the 1<sup>st</sup> defendant is estopped by the doctrine of equitable estoppel. It should be pointed out from the outset that this court is not determining an application for setting aside the settlement agreement but it has been invited to determine the question as to whether the settlement agreement should be adopted and treated as constituting the full agreement between the parties.
- 19) It is not disputed that the settlement agreement was executed by the parties without the participation of their advocates. There is also no dispute that the parties were represented by counsels in this matter except in the process of negotiations for an amicable settlement which gave rise to the settlement agreement.
- 20) When it comes to party and party costs and profit to costs, a party is only entitled to recover the proven disbursements incurred in

prosecuting its case and where an advocate acts for a party, such an advocate is entitled to recover over and above the disbursements paid by the successful party as court fees, reasonable expenses.

21) The law prohibits lay people from charging fees or sharing fees with an advocate. The parties herein could not therefore purport to determine whether or not to waive fees due to an advocate.

22) In Judicial Hints on Civil Procedure, by Richard Kuloba (retired), 2<sup>nd</sup> Edition Law Africa at p. 119, it is stated inter alia as follows:

**“In the case of a private litigant, no difficult arises. The profit costs in respect of advocates work are simply paid over to the advocate. In the facts, the advocate receives all monies and he pays over to his client only what is due to him under the judgment of the court.”**

23) At the time of executing the settlement agreement, costs had been taxed. Clause 4 of the agreement simply states that upon execution of this agreement, the parties agree to lodge a consent order in court to dismiss the proceedings with no order as to costs. The aforesaid clause in my view did not specifically address party and party costs and profit costs due to the advocate which had been taxed giving rise to issuance of two certificates of costs.

24) Mr. Kihara, in his submission urged this court to determine the validity of the settlement agreement. He submitted that the agreement was not signed by all the parties nor signed in accordance with the Provisions of Section 177 of the Companies Act. With respect, I agree with the submissions in rejoinder by Mr. Thangei, that Mr. C. N. Kihara did not make a statement under oath to challenge the validity of the settlement agreement.

25) On the basis of this conduct, I decline to entertain the invitation. Had C. N. Kihara made averments under oath, the 3<sup>rd</sup> defendant could have had a chance to file a response. The opportunity to respond to the assertion was lost when the deponent failed to put it in his replying affidavit. If this court proceeds to determine the issue, then the 3<sup>rd</sup> defendant would lose the right to a fair hearing. Consequently, I decline the invitation. In view of the above holding, I am convinced that the settlement agreement is still valid though its validity is open to a further challenge. However, in view of the weaknesses pointed out, that is to say that the settlement agreement is vague as regards party and party costs and profit costs. I think a fair order in the circumstance is to defer the decision to adopt the settlement agreement for a period of 30 days and direct the parties to have Clause 4 of the agreement varied to expressly provide and settle the question of party and party costs, profit costs and interest thereon as certified and payable to the advocates.

26) In the circumstances of his case a fair order on costs is to order that each party shall meet its own costs of the proceedings leading to this ruling.

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of July, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant