



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

COMMERCIAL CASE NO. 18 OF 2017

BETWEEN

GALEXON KENYA LIMITED.....PLAINTIFF

AND

CENTRE FOR YOUTH LINKAGES

AND EMPOWERMENT PROGRAMMES.....1ST DEFENDANT

COUNTY GOVERNMENT OF VIHIGA.....2ND DEFENDANT/APPLICANT

ANNET ILAMUNYA & 2 OTHERS (Sued on their

own behalf and as officials of Mbale Open

Air Committee (C.B.O).....3RD DEFENDANTS

RULING

The background

1. The genesis of this suit is a Memorandum of Understanding (*hereinafter referred to as the MOU*) dated 21st July 2016 between the Plaintiff and the Applicant, for various activities in the County of Vihiga which included construction of market stalls at Mbale Market.
2. By an agreement dated 27.7.16 (*hereinafter referred to as the Construction Agreement*), the Plaintiff and 1st Defendant agreed that Plaintiff would construct 500 modern entrepreneurial market stalls in the County of Vihiga at a cost of Kshs. 54,225,000/-.
3. Consequently by a plaint amended on 4.11.17 and filed on the same date, the Plaintiff pleaded that it had constructed 201 stalls and sought orders as against the 1st and the Applicant for Kshs. 21, 798,450/- for the constructed stalls; general damages for breach of contract; interest and costs.
4. Plaintiff's claim was denied by way of a defence filed on behalf of the 1st defendant and the Applicant by Aggrey Musiega for County Attorney.
5. Thereafter, the Plaintiff and the Applicant took cue from the dictates of Article 159 (2) (c) of the Constitution of Kenya and the Applicant's County Executive Member for Trade, Tourism, Industrialization and Entrepreneurship by a letter dated 01.08.18 **KMK1** invited the parties for a meeting. Minutes demonstrate that the first meeting was held on 09.08.18 and was attended by among others George Sore, the Applicant's legal counsel who after deliberations was tasked to draw a Deed of Settlement. Another set of minutes shows that a subsequent meeting held on 12.09.18 where those present deliberated on the Deed of Settlement among other issues.
6. The Deed of Settlement was signed on behalf of the Applicant by one Geoffrey Vukaya County Executive Member for Trade, Tourism, Industrialization and Entrepreneurship and was filed and lawfully adopted as an order of the court on 14th December, 2018 where the Applicant was represented by Mr. Bagada advocate who was holding brief for Mr. Sore for the Applicant. On quantum of damages submissions on behalf of the Applicant were filed by George M. Sore on 21.03.19 upon which the court delivered the impugned ruling on 28th March, 2019.

7. Being aggrieved by that ruling, the Applicant has brought a notice of motion dated 13th June, 2019 premised under the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 9 rules (9), Orders 42, 45 and 51 rule 51 of the Civil Procedure the 2nd Defendant/Applicant prays for orders that:

a. The Honourable Court be pleased to set aside and /or review and/ or vary the Deed of Settlement dated 10th December, 2018 and the subsequent ruling delivered on 28th March, 2019

b. Costs of the application be in the cause

8. The application is based on the grounds among others that: -

i. The Deed of Settlement dated 10th December, 2018 and the subsequent ruling delivered on 28th March, 2019 have an apparent error on the face of the record

ii. That The Deed of Settlement is not properly and lawfully executed by the parties

iii. That the execution of the Deed of Settlement was made without the authority of the Applicant

iv. The Applicant has a good defence on merit to the Plaintiff's claim on account of the doctrine of privity of contract

9. The application is further supported by an affidavit sworn on 13.06.19 by Stella Orengo who describes herself as the director of legal services to the Applicant in which she reiterates the grounds on the face of the application. of the applicant, who reiterates the grounds on the face of the application.

10. In opposing the application, Cyril Mukhunji Makatiati, who describes himself as the manager of the Plaintiff avers that the Applicant is deliberately misleading court by concealing material particulars. He avers that by a letter dated 01.08.18 **KMKI**, the Applicant's County Executive Member for Trade, Tourism, Industrialization and Entrepreneurship invited the parties for a meeting held on 09.08.18, which was attended by among others George Sore, the Applicant's legal counsel who was also on record in this matter who was tasked to draw a Deed of Settlement. It is further deposed that the Deed of Settlement was signed on behalf of the Applicant by one Geoffrey Vukaya County Executive Member for Trade, Tourism, Industrialization and Entrepreneurship was filed and lawfully adopted as an order of the court on 14th December, 2018 with a view to reaching an out of court settlement. It is also averred that parties did not agree on quantum of damages as a result of which submissions were filed including on behalf of the Applicant by George M. Sore on 21.03.19 upon which the court delivered a ruling on 28th March, 2019.

11. According to the Plaintiff, the Applicant has not demonstrated illegality or fraud and the present application is meant to buy time and delay execution and ought to be rejected.

12. In her supplementary affidavit sworn on 25th June, 2019; Stella Orengo the director of legal services to the Applicant avers that there was no consent between the Plaintiff and the Applicant and that Deed of Settlement was void *abinitio* and contrary to public policy.

13. The present application is really between the Plaintiff and the Applicant. 2nd and 3rd respondents did therefore not file any response to the Applicant's notice of motion. When the application came up for hearing on 26.06.19; I directed that it be disposed off by way of written submissions which the Applicant and Plaintiff dutifully filed.

Applicant's submissions

14. The Applicant holds the view that it has met the threshold for stay of execution for the reason that the Plaintiff has not tendered any evidence that it can repay the colossal sum of Kshs. 21,000,000/- should the consent be set aside.

15. Applicant submits that the application was brought without delay; reiterates that there was no contract between it and the Plaintiff and that it has a strong defence to the Plaintiff's claim.

16. The Applicant additionally submits that the Deed of Settlement ought to be set aside for the reason that it was executed without authority, was not executed by the 1st and 2nd Defendants and is contrary to public policy. Reliance was placed on **Ibrahim Okoyona Shiambiri v Ziporah Musi & Anor [1987] eKLR**.

Plaintiff's submissions

17. The Plaintiff holds the view that the application is frivolous and vexatious for the reason that the Applicant cannot claim ignorance of the existence of the Deed of Settlement which it drew and executed together with the Plaintiff and the 1st Defendant. Reliance was placed on **Cfc Stanbic Bank Limited v Echuka Farm Limited & another [2016] eKLR**.

18. The plaintiff submits that the Applicant had not established the existence of collusion, fraud, illegality or insufficiency of material facts necessary to vitiate a consent judgment such as the one between the parties herein. Reliance was placed on **Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] eKLR**.

19. The Plaintiff asserts that the Applicant has not disputed that it was represented by counsel throughout the proceedings and further that

even if counsel didn't have instructions which has not been pleaded, there exists an implied authority that counsel had authority to bind the Applicant. On this point, reliance was placed on **Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd** (supra) and **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR**.

20. The Plaintiff argues that this application is made in bad faith to delay execution and urges the court to protect its integrity from being abused. In support of this argument the Plaintiff relied on the cases of **John Kimani Njoroge v Joseph Muthiora Wainaina (2012) eKLR 2009: Stephen Somek Takwenyi & Another v David Mbutia Githae & 2 Others**.

21. The court was urged to reject the Applicants application of approbating and reprobating for the reason that the application seeks to renounce and set aside a consent judgment which the Applicant claims does not exist. In support thereof, reliance was placed on **Kenya Commercial Bank V Muiri Coffee Estate Limited & 4 Others, Civil Appeal no. 100 of 2010** where the court stated a party that seeks to set aside its own freely negotiated consent, was a classical case of approbating and reprobating which the law frowns upon.

22. The Plaintiff urges the court to find that the Applicant is guilty of misrepresentation of facts which disentitles it to the orders sought. In support, Plaintiff relied on **Republic V Institute Of Certified Public Secretaries Of Kenya Ex-parte Mundia Njeru Geteria [2010] eKLR** which cited with approval the decision in **R V Kenya Revenue Authority Ex Parte**

23. The Plaintiff further submits that the Applicant is guilty of laches for the reason that the ruling sought to be aside was made on 28.03.19 and was served on them on 29.03.19 and ought to be rejected since the delay is unexplained. Reliance was placed on **Adam Said Jumbe & Merceline Kishaga Buluma v Preston Mwakio Jumbe [2017] eKLR** where a non-explained delay of fourteen (14) years was considered inordinate and inexcusable.

24. Finally, the court was urged to find that the application obstructs the timely and expeditious disposal of cases and would cause prejudice to the Plaintiff who is a contractor and who has been grounded for non-payment.

25. I have carefully considered the submissions of Counsel, the authorities relied upon and the record generally.

26. There is no dispute that the Applicant was served with the impugned ruling and order on 29.03.19. This application was filed on 13.06.19 which is more than 3 months from the date of the impugned ruling. The 3 months' delay has not been explained.

27. The foregoing notwithstanding, I have a duty to consider the merits of the application. It is not disputed that the impugned Deed of Settlement was signed on behalf of the Applicant by one Geoffrey Vukaya and Philip Aluodi Gavuna who are County Executive Member for Trade, Tourism, Industrialization and Entrepreneurship and chief officer department of Trade, Tourism, Industrialization and Entrepreneurship respectively and was lawfully adopted as an order of the court on 14th December, 2018 where the Applicant was represented by Mr. Bagada advocate who was holding brief for Mr. Sore advocate for the Applicant.

28. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited** (supra) which cited with approval the decision in **Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd** (supra), the court held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding”.

29. Although the cited authority only refers to counsel, the Applicant has neither averred nor demonstrated that Geoffrey Vukaya, Philip Aluodi Gavuna and George M. Sore did not have authority to act on its behalf. Consequently, this court finds that Geoffrey Vukaya, Philip Aluodi Gavuna and George M. Sore had authority to act for the Applicant and had full mandate to compromise the suit on its behalf.

30. The deed of Settlement culminated into a consent judgment dated 14th December, 2018 that was signed by Mr. Bagada advocate who was holding brief for Mr. Sore for the Applicant. Of interest to note is that the Applicant has not sought to set aside that consent judgment. Be as it may, the Applicant has not established the existence of collusion, fraud, illegality or insufficiency of material facts necessary to vitiate that consent judgment and it is therefore binding as between the Plaintiff and the Applicant.

31. The consent judgment dated 14th December, 2018 culminated into the impugned ruling delivered on 28th March, 2019. As was pointed out in the impugned ruling, the Deed of Settlement created a relation that is recognized by law, as between the Plaintiff and the Applicant when it declared at clause (1.0) that the parties agreed that:

On the terms and conditions stated herein in this deed, the Parties hereby agree, without any admission of liability whatsoever, to a full and final settlement in all and every respect of all and every claim, relief, liabilities, loss and/or damage of whatsoever nature against or by whosoever that each party has or may have raised, pleaded, disclosed, referred to and/or relied on in relation to the matters pleaded.

32. The issue of liability was settled by the consent order dated 14th December, 2018 where the Applicant was represented by Mr. Bagada advocate who was holding brief for Mr. Sore for the Applicant.

33. In the impugned ruling and after considering that liability had been agreed as between the Plaintiff and the Applicant, the court ruled that the Applicant had by Clause 1.0 of the Deed of Settlement bound itself to compensate the Plaintiff in all and every respect of all and every claim, relief, liabilities, loss and/or damage of whatsoever nature against or by whosoever that each party has or may have raised, pleaded, disclosed, referred to and/or relied on in relation to the matters pleaded.

34. From the foregoing, I am persuaded that Applicant seeks to set aside its own freely negotiated consent. A party's conduct of approbating and reprobating is unacceptable and courts frown upon such conduct. **(See Kenya Commercial Bank V Muiri Coffee Estate Limited & 4 Others (supra) and Aberdare Freight Services Ltd HDWC App. 9410/04).**

35. The Applicant prayed for the sum of Kshs. 21, 798,450/- being the cost of the 201 constructed stalls and judgment was entered for the said sum. When Geoffrey M. Sore filed submission on quantum on behalf of the Applicant, the Applicant proposed that the Applicant be indemnified to the same position that it would have been had the transactions not taken place

36. It is evident from Clause 5.0 of the Deed of Settlement that:

The County Government of Vihiga CGV) (the Applicant herein) subject to adoption by the court agreed to indemnify Galexon based on the estimation of the value of the works done as far as contemplated in the clause.

37. The minutes of a meeting held on 09.08.18 which was attended by among others George Sore, the Applicant's legal counsel demonstrates that the cost per stall had been agreed at Kshs. 108, 450/- which translates into Kshs. 21,810,510/- for the 201 stalls which sum the Plaintiff was awarded.

38. Order 45 of the Civil Procedure Rules provides as follows:

1. (1) Any person considering himself aggrieved-

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

39. In the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, cited by the Applicants, the Court of Appeal stated with regard to review that: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

40. I have carefully considered the Applicant's notice of motion and the affidavits in support and I have not found any evidence that there exists some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle them to an order of review of the court's ruling dated 28th March, 2019. Similarly, the Applicant from the foregoing analysis has not demonstrated that it has an arguable defence to the Plaintiff's claim.

41. After due consideration of all the material placed before the court, I find that the notice of motion dated 13th June, 2019 has no merit and is disallowed with costs to the Plaintiff.

DELIVERED AND SIGNED AT KISUMU THIS..03rd...DAY OF...October..2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For Plaintiff - N/A

For 1st Defendant - Mr Bagada/Mr Muia

For 2nd Defendant/Applicant - Mr Onyango/Kinyanjui

For 3rd Defendants - N/A