REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NUMBER 216 OF 2007

(CONSOLIDATED WITH HCC NO. 255 of 2007 & HCCC NO. 219 OF 2007)

JOHN O. OCHANDA & OTHERS. ..... APPLICANTS

(Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya)

VERSUS

TELKOM KENYA LIMITED. ..... RESPONDENT

R U L I N G

1. John Ochanda and over 900 other Applicants in this case (hereinafter "the Applicants"), were prior to 2006 employees of Telkom Kenya Ltd, (**"the Respondent**"). Between 31st May and June, 2006 the Applicants found themselves in the streets as a result of being retrenched by the Respondent in the first phase of the retrenchment carried out by the Respondent in its staff rationalization programme.
2. Pursuant to the said retrenchment, the Applicants filed this suit in 2007, seeking various prayers, to wit, a declaration that the benefits paid to them were grossly undervalued, injunctive reliefs and general damages. The suit was consolidated with HCCC 255 and 219 of 2007. After trial, judgment was delivered on 28th September, 2011 in favour of the Applicants as follows: -

> **"a) the Plaintiffs be paid severance pay based on 2½ months' salary for each year of completed service.**
>
> **b) the Plaintiffs be paid golden handshake on the same scale as what was paid the retrenchees in Phase 2.**
>
> **c) the Plaintiffs get costs and interest."**

3. Of course the Respondent would hear none of that. It appealed against that decision in **Civil Appeal No. 207 of 2012,** which appeal was dismissed with costs. Attempts to execute a decree resulting from the said judgment have been unsuccessful. As can be seen from paragraph 2 above, the judgment as pronounced could not be executed since it required further steps to the undertaken

on the part of the Respondent. The Judgment had declared the rights of the Applicants and the obligations of the Respondent. Any effort on the part of the Applicants to effect the said judgment has been met with serious opposition by the Respondent.

4. To show how acrimonious and stormy the relationship between the parties has been, subsequent to the said judgment, there has been a total of nine (9) other proceedings connected thereto. These are as follows: -

a. NRB HCCC No. 545 of 2011 meant to stop the winding up of the Respondent;
b. NRB Industrial Court Cause No. 654 of 2014 meant to restrain the Respondent from disposing of its assets;
c. CA No. NAI 237 of 2011 for a stay of execution;
d. CA No. NAI 112 of 2012 for a stay of execution;
e. CA No. NAI 24 of 2013 for leave to appeal to the Supreme Court;
f. CA No. 207 of 2012 which was decided in favour of the Applicants;
g. CA No. 60 of 2013 which was decided in favour of the Respondents;
h. Supreme Court Motion No. 17 of 2014; and
i. Supreme Court Motion No. 24 of 2014.,

(All hereinafter referred to as "**the aforesaid proceedings**.")

5. During the year 2014 and in answer to the dictates of Article 159(2) (c) of the Constitution of Kenya, the parties commenced serious negotiations through their respective Advocates with a view to settling the aforesaid proceedings and bring to a sensible and ultimate end this long and protracted dispute. The said negotiations were concluded with a Deed of Settlement dated 8th August, 2014 (hereinafter "**the Deed of Settlement"**)
6. I think it is important to recite here some of the recitals and terms of the said Deed. The deed declared that it was made between the parties to these and the aforesaid proceedings through their named Advocates.

> ***"F) the parties have mutually agreed through their respective advocates in this Deed the terms for the full and final settlement of the Court Proceedings and all claims related thereto and wish to record the terms of the settlement on a binding basis, in this Deed.***

7. ***"Settlement Sum" means the total sum payable by TELKOM to the CLAIMANTS under this Deed as computed at Schedule 1, which is the net sum of all statutory deductions, deductions for payments already made to the CLAIMANTS as provided herein, interest and the statutory deductions thereof.***

> ***The Total Settlement Sum inclusive of relevant taxes but exclusive of costs amounts to Kshs.1,416,136,676/- corresponding to: -***

a. ***Kenya Shillings One Billion Two Hundred Thirty Seven Million Four Hundred and Forty Four Thousand Seven Hundred Eight (Kshs.1,237,444,780/- for the Severance pay to all Claimants;***

b. ***Kenya Shillings One Hundred and Forty Million One Hundred Thousand Only (Kshs.140,100,000/-) only for Golden handshake to all Claimants.***

c. ***Kenya Shillings Two Hundred Sixteen Million, Twenty Thousand Eight Hundred Forty Nine (Kshs.216,010,849/-) only for interests.***

d. ***The net sum payable to the CLAIMANTS after deduction of all outstanding liabilities, amounts paid on retrenchment and applicable taxes is Kshs. One Billion Twenty Two Million Four Hundred Thirty Seven Thousand One Hundred Sixteen (Kshs.1,022,437,116) (inclusive of taxes deducted).***

e. ***The parties have agreed that costs will be Kenya Shillings Thirty Million only***

Kshs.30,000,000.00 (all inclusive).

> ***2.1.4 Prior to the first instalment payment being made, the CLAIMANTS Advocates shall release to TELKOM'S Advocate the duly executed consents orders, marking as withdrawn and /or as fully and finally settled, whichever is applicable, to all court proceedings pending before courts of law and the letter of instructions to the Bank authorizing the release of the funds in Escrow.***
>
> ***2.1.5 TELKOM'S Advocate shall as soon as practicably possible, file the duly executed consents marking all pending court proceedings as either withdrawn, or as fully and finally settled, whichever is applicable. TELKOM'S Advocates will also present the letter of instructions to the Bank to release the funds with immediate effect. The consents shall be filed on the date of execution of this Deed by both the CLAIMANTS Advocates and TELKOM'S Advocates or not later than one (1) day after the execution of this Deed by the above parties."***

8. The Deed seems to have provided for all that was required to fully and finally settle the dispute between the parties. The same was duly signed by the parties Advocates on the said 8th August, 2014.
9. However, in a characteristic defiant attitude, the Respondent wrote on the same date to its Advocates as follows: -

> ***"Re: Settlement Deed between Telkom Kenya Ltd and John Ochanda and Former Employees of Telkom Ltd.***
>
> ***We refer to the above matter and our emails dated 4th August, 2014 and 8th August, 2014 through which we instructed you not to sign the settlement deed without our express instructions as we had to get approval from our Board of Directors. However, we note that today in total disregard of the above instructions you have proceeded to sign the settlement deed on behalf of the company....."***

That letter is shown to have been received by the Respondent's Advocates on the 11th August, 2014.

10. With that letter, the effort by the respective Advocates to bring the dispute to a close was brought to nought. An exchange of correspondence did not remedy the situation. As at 19th November, 2014, more than four (4) months later, the Respondent's Board of Directors does not seem to have met to discuss, approve or reject the Deed.
11. This prompted the Applicants to take out a Motion on Notice under Order 25 Rule 5 of the Civil Procedure Rules, Article 159 of the Constitution and the Inherent jurisdiction of the Court seeking three (3) Principal prayers, to wit; that: -

> ***"2. The Deed of Settlement/Compromise dated 8th August entered into between the parties herein be recorded as a decree of the court.***
>
> ***3. The Plaintiff/Applicants be at liberty to execute the consequential decree in its favour.***
>
> ***4. The Plaintiff/Applicants be at liberty to take out such further proceedings for execution for recovery of any balance as may thereafter remain outstanding on the decree."***

12. The grounds for the application were set out in the body of the Motion and Supporting Affidavit

of Naphutally Kibuti Kanyoro sworn on 19th November, 2014. These were to the effect that both this court and the Court of Appeal had ruled that the Respondent do pay the Applicants their dues; that in pursuance thereof the parties had negotiated a settlement under which the Respondent was to pay the Applicants Ksh.1,416,136,676/- exclusive of costs; that a Deed of Settlement had been executed but the Respondent had reneged on it alleging that its Advocates did not have authority to execute the Deed. The Applicants averred that they are now living in abject poverty and pleaded with the court to assist them in having a chance to enjoy the fruits of justice.

13. Mr. Ahmednasir S. C. teaming up with Mr. Koech for the Applicants submitted that; the Deed of Settlement was quite clear in its terms, that the same sought to settle all the disputes between he parties; that the matter not being contentious, this court cannot be said to be functus officio; that there was no need of a fresh suit to enforce the agreement contained in the Deed and that the firm of Mohamed Muigai Advocates had ostensible authority to execute the Deed and the same was binding upon the Respondent. In Counsel's view, Clause 10 of the Deed required all the parties to do all that was necessary to effectuate the Deed.

14. Counsel referred to the Cases of **Kenya Commercial Bank Vs Benjoh Amalgamated Ltd & Anor. C.A No. 267 of 1997 (UR), Diamond Trust Bank of Kenya Vs PLY and Panels Ltd & Others - CA No. 243 of 2002 and Kenya Commercial Bank Ltd Vs Specialized Engineering (1982) KLR 485** in support of their submission that an Advocate has a general authority to compromise a suit on behalf of his client. Counsel urged that the application be allowed.

15. The Respondents opposed that application vide a Replying Affidavit by Ivy Ngana sworn on 2nd December, 2014. It was contended that there was an application pending in the Supreme Court seeking leave to appeal against the Judgment of the Court of Appeal; that because of the multiplicity of proceedings, the parties had intended to have a negotiated settlement through their respective Advocates; that a Deed was subsequently executed without instructions of the Respondents; that since the judgment of this court was merely declaratory, there was no order for payment of any dues; that the procedure of enforcing a contract had not been adhered to and that vital steps had not been taken to enforce the compromise.

16. Mr. Nyaoga teaming up with Mr. Mogere submitted on behalf of the Respondent that this court is functus officio in that the proceedings in this suit had been concluded; that since there was already a decree in this case, no subsequent decree can be made through the present application; that if the Deed was a contract; the same can only be enforced by the filing of a suit in which the Respondent will be entitled to raise its defence. Finally, counsel submitted that since there was no authority by the Respondent, the Respondent's Advocates could not bind the Respondent in the execution of that Deed. Counsel urged that the application be dismissed.

17. I have carefully considered the deposition of the parties, the submissions of Counsel, the authorities relied on and the record generally. This is an application to record the Deed dated 8th August, 2014 as a decree of this court. The first issue is whether, there is a compromise so called and whether in the circumstances of this case, the Respondent is bound therewith.

18. As stated at the beginning of this ruling, the Deed of Settlement dated 8th August, 2014 was entered into between the parties through their respective Advocates. The Advocates acting for the Respondent were Mohamed Muigai Advocates. It is that firm of Advocates which drew the Deed. The intention of the parties was to settle the aforesaid proceedings and the entire claim by the Applicants against the Respondent. The identities of the claimants were fully established and disclosed in the schedule, the total amount payable under the Deed was also ascertained, the mode of payment was agreed as was the obligations and rights of the respective parties.

19. The Deed was not a one day event. It was as a result of long and protracted negotiations between the parties. Indeed in paragraph 6 of the Replying Affidavit of Ivy Ngana, she stated that: -

> ***"6. In view of the multiplicity of proceedings pending before the various courts, the parties intended to have all the matters amicably settled through a negotiated process, which was to culminate in a Deed to be executed by the parties, through their respective Advocates in this matter."***

20. It is on the foregoing basis that the Advocates for the respective parties executed the Deed dated 8th August, 2014. That Deed was subsequently field in this court on 10th October, 2014 and fees of Ksh.70,075/- paid in respect thereof.

21. It is the Respondent's contention that the Deed is null and void for want of authority on the part of its Advocates to execute the same. The Court of Appeal decision of **Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (Supra)** was relied on by the Respondent. Further, an email sent by the Respondent to its Advocates Ms Mohamed Muigai, on 8th August, 2014 at 11.12 a.m. produced as **"IN1"** was relied on. In that email, the Respondent wrote: -

> ***"Kindly find some amendments. Please let us have the executed agreement by the Plaintiffs. Please do not execute on our behalf as the same has to be approved by our BOD."***

22. Firstly, it is not clear as to what time the Deed was signed. Whether it was before or after receipt of this particular email. There was no Affidavit by the Advocate who executed the Deed to tell the court whether it was signed before or after receipt of these instructions from the Respondent. What is clear is that the Deed was signed in the morning of the 8th August, 2014.
23. In my view however, it does not matter whether the Advocate executed the Deed before or after receipt of this email. That email was not copied to the Applicant's or their Advocates. The contents therein cannot bind the Applicants. What is clear is that there had been long negotiations whose **sole intention** was to arrive at a **holistic** settlement of the dispute between the parties. This had been achieved through the Deed.
24. In the same authority relied on by the Respondent of **KCB Ltd Vs Specialised Engeering Co. Ltd, (supra),** Harris J at page 493 held that: -

> ***"the 7th Edition of Seton was published in the year 1912, that is more than sixty five years ago. It does not take into account the decision of Mc Cardie J in Welsh Vs Roe (1918) 87 LJkb 520, where the earlier authorities were carefully considered and it was held that after the commencement of an action, the solicitor for a party has an implied general authority to compromise the settlement the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the attention of the other side." (Emphasis supplied)***

25. In my view, it is trite law that an Advocate who is seized with a matter has an implied authority to enter into a compromise on behalf of his client. This is a clear statement of the law that does not require any authority. Even if there is express negative instruction by a party, unless those instructions are brought to the notice of the third parties who are dealing with such advocate, that express negative instruction cannot be set up as against such third parties. This is so considering the special position which an Advocate enjoys vis a vis his client. If parties are to be allowed to hide behind express undisclosed negative instructions, it will make dealings between advocates to be almost impossible and legal business will be a nightmare.
26. In the present case, Ms Mohamed Muigai were the Respondent's Advocates. The alleged negative instructions were never communicated to the Applicant's Advocates. The Deed of Settlement for all purposes and intents is valid and binding on the parties. None of the parties can seek to escape from it. It has not been argued that it was obtained under circumstances that will vitiate a contract. It is my finding, and I so hold, that the Deed of Settlement dated 8th August, 2014 is lawful and valid and is binding upon the Respondent.
27. I have looked at the Replying Affidavit of Ivy Ngana and the correspondence annexed thereto. In paragraph 12 thereof the deponent has stated: -

> ***"12. The allegation that the Respondent has resorted to mind games with the Plaintiffs to buy time does not have any basis at all. It is clear that without instructions for a client an advocate cannot purport to compromise a matter pending before a court of law. Any such action is null and void and cannot be enforced upon an unwilling party."***

28. That statement is full of meaning. The Respondent had instructed the firm of Mohamed Muigai Advocates as Advocates in the aforesaid proceedings as well as to enter into negotiations that resulted in the execution of the Deed. The Respondent held out the said Advocates as having authority to negotiate the settlement. The Respondent is now estopped from asserting that the said

Advocates "**purported to sign the Deed"** on its behalf for reasons that the Respondent is an **"unwilling party**". If this be the case, that the Respondent is an unwilling party, then the Respondent should be told firmly, loudly and clear that it cannot take everybody in circles. If it was unwilling to have the matters settled, nothing would have been easier than telling the Applicants as such at the earliest.

29. I have always known the position of the law to be that, a party cannot enter into legal relations with another on the basis of agreed set of facts then thereafter pulls out after an agreement is arrived at on the basis that it was unwilling to enter into such legal relations. That won't do. The court views the conduct of the Respondent to be that of an **"unwilling party"** in all these transactions. That is probably why after leading the Applicants into entering into those negotiations, upon agreement being reached, the Respondent now purports to raise the tramp card that it's Board of Directors have to approve the settlement.

30. Whilst it is clear that the settlement was arrived at on 8th August, 2014, the Respondent called for the Deed of Settlement on the same day for its Board of Directors to approve. Four (4) months later when the present application was being filed, that Board had not yet approved or rejected the Deed. As late as 4th February, 2015 when the application was being argued, the court was not told what decision the Respondent's Board had made, if any.

31. To my mind, I believe the issue of the negotiations was being initiated and or conducted by the Respondent to hold the Applicants from pursuing their rights. When a settlement was reached, the Respondent reneges on it, so that another front for legal battle that will run for years would be opened. It is probably in the mistaken belief of the Respondent, that by the time that battle finally reaches the Supreme Court, it would be many years to come. That won't do. I am afraid that that route may not be open to the Respondent. The Deed is lawful and binding upon the Respondent. What remains is its enforcement.

32. The next issue raised is that this Court is functus officio and a second decree cannot issue while that given by Mwera J is still subsisting. The Applicants submitted that since the matter is not contentious, the court is not functus officio.

33. In its judgment of 9th May, 2014 in **CA No. 60 of 2013 Telkom Kenya Ltd. –vs- John Ochanda,** the Court of Appeal delivered itself thus;-

> ***"Functus Officio** is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th century. In the Canadian Case of CHANDLER –vs- ALBERTA ASSOCIATION OF ARCHITECTS (1989) 2 S.C.R. 848 Sopinka traced the origins of the doctrines as follows (at p.860);*
>
> > *'The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re Nazaire Co. (1879) 12 ch. D.88. The basis for it was that the power to re-hear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal Judgment had been drawn up, issued and entered, and was subject to two exceptions.*
>
> 1. ***Where there had been a slip in drawing it up, and***
>
> 2. ***Where there was an error in expressing the manifest intention of the Court".***

34. The Court of Appeal then went on to state that:-

> ***"We are of the respectful view that the Learned Judge was clearly wrong when he failed to declare the Court functus officio and devoid of jurisdiction to grant the respondents' prayers."***

It further continued that:-

"Nor was there need or jurisdiction, within the same suit, for the Learned Judge to attempt to so convert the character of the judgment entered by Mwera J who had, in what must banish any notion that there was any error or omission in the judgment as framed, stated in an earlier ruling in the matter that he would deliver a judgment "in rem", not "in personam" ----------. It can only be surmised therefore that by employing that terminology in the context of the pleadings and the case before him, Mwera J implied that the suit was purely a declaratory suit, limited in scope and falling short of granting specific, quantified and executable decree in favour of each respondent".

35. Whilst I am alive to the fact that in the above ruling the Court of Appeal was addressing a decision of this court wherein it had directed the filing of Affidavits to establish the quantum payable to each applicant, I nevertheless conclude that that court held the matter as being functus officio. In the present case, whilst it may be true as quite rightly put by Counsel for the Applicants that the matter is not being re-opened for trial on merits, a decree has already been drawn up, issued and entered. Execution has also been attempted.
36. For the foregoing reason and for the reason that there can be no two decrees arising from the same suit, I find it difficult to come to a different conclusion than that the court is functus officio. The Applicants are not barred from bringing a fresh suit based on the Deed of Settlement for the reason that, as declared by the Court of Appeal in the aforesaid CA No. 60 of 2013, Mwera J's Judgment was only declaratory and therefore not specific. The Deed of Settlement has not only identified all the claimants but also, the amount payable to each one of them. If an application for review had not been heard and dismissed probably that would have been the route to take whereby the earlier decree, could be reviewed and replaced with one that is in terms of the Deed. But as the case stands that is not possible.
37. In any event, it is premature to seek to enforce the Deed of Settlement the way the Applicants have sought. The letters from the Respondent's Advocates reneging on the Deed are not enough to seek the enforcement of the Deed of Settlement. That Deed requires in clauses 2.1.4 and 2.1.5 set out above, that the Applicants Advocates prepare and submit to the Respondents Advocates duly executed consents withdrawing or marking the aforesaid proceedings as settled. It is thereupon that the Respondents Advocates are enjoined to execute such consents and file them in the respective suits. It is only then that the other obligations as to payments etcetera on the part of the Respondent shall arise. In my view, therefore, it is after complying with the said provisions of the Deed that the Applicants can demand specific performance by the Respondent failure to which a suit on the same can be lodged.
38. This is a sad story. It is not in dispute that the Plaintiffs toiled their youthful years with the Respondent. They offered their services as best as they could to the Respondent for which it immensely benefitted, until it decided to terminate those services during its staff rationalization programme. It is regrettable that even after two (2) courts, this and the Court of Appeal, have pronounced that the Respondent ought to pay the Applicants certain monies, which the Applicants as well as the Respondent have ascertained through the Deed of Settlement dated 8th August, 2014, as being approximately Kshs.1.4 Billion the Respondent is still bent on postponing its day of reckoning. In its endeavour to extend legal battles, and thereby subject the Applicants into further poverty, the element of interest that will ultimately be payable on the amount to be awarded to the Applicants is something the shareholders of the Respondent should ponder about. No amount of postponement that can save the Respondents from its legal obligations. If the law and procedure would have allowed, the proceedings should have terminated at this juncture but this is not the case.
39. In view of the foregoing, I am regrettably satisfied that the application is without merit and the same is hereby dismissed with costs.

DATED, SIGNED and DELIVERED this 7th day of April, 2015.

.....

A MABEYA

JUDGE