



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 335 OF 2011

A.S. SHEIKH TRANSPORTERS LIMITED1ST PLAINTIFF

ABDI SAID SHEIKH.....2ND PLAINTIFF

Versus

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

JOSEPH G. MUTURI T/A MUGA AUCTIONEERS

& GENERAL MERCHANTS.....2ND DEFENDANT

MARTIN WHITEHEAD.....3RD DEFENDANT

KURIA MUCHIRU.....4TH DEFENDANT

RULING

Satisfaction and adjustment of suit

[1] The question I am faced with is whether this *suit has been adjusted wholly or in part by any lawful agreement or compromise, or satisfaction by the defendant in respect of the whole or any part of the subject matter of the suit* in terms of Order 25 rule 25 of the Civil Procedure Rules which can be a basis of judgment in the this suit. The application is by the 1st Plaintiff and is dated 23rd July, 2013. The application claims that the 2nd and 3rd Defendants ceased being the receivers and managers of the 1st plaintiff-a formal letter was written and the defendants confirm that position; and they also released KAZ 516M Mercedes Benz Actros and Trailer registration number ZC 4425 to the Plaintiffs after selling all the other vehicles. According to the Plaintiffs, these events by and the conduct of the Defendants amounts to compromise of the suit on which judgment on satisfaction of prayers *d* and *e* of the Amended Plaint should be entered by the court. On the other hand, the Defendants stated that there has been no compromise or consent or agreement of the parties on the suit which would amount to satisfaction or adjustment capable of supporting a judgment in the suit. What has happened, according to the Defendants, is that the said prayers have simply been overtaken by events. The defendants were categorical that the 3rd and 4th defendants have, by their conduct, done the opposite of ‘satisfaction’, as they acted as receivers and sold the trucks and trailers belonging to the 1st plaintiff and that were not the

result of an agreement between them. But they make a startling averment that the 1st Plaintiff has not provided proof that they are even the owners of the said truck. I wish to settle that aspect of the Defendants' argument straight away. Copies of the log books provided show the 1st Plaintiff is the registered owner of KAZ 516M Mercedes Benz Actros and Trailer registration number ZC 4425. In law, such registration is prima facie evidence that the 1st Plaintiff is the owner of the truck and trailer. No contrary evidence has been adduced. The argument fails and I do not think it is of any help to the defendants.

[2] The Defendants have also raised another issue of preliminary importance-that the Plaintiff as well as the Amended Plaintiff offend the mandatory provisions of Order 4 Rule 1 (2) and (4) of the Civil Procedure Rules for they have not been supported by a verifying affidavit as is required by law. The 1st Plaintiff being a company requires an officer of the company to swear a Verifying Affidavit on its behalf. I will come back to this issue later. Meanwhile let me state the true position of the law on satisfaction and adjustment the way I understand it.

[3] The primary law is Order 25 rule 25 of the Civil Procedure Rules and it provides as follows;

“(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.”

[4] The key words in Rule 25 are ***agreement, compromise or satisfaction***, which is expressed in this statement... ***any lawful agreement or compromise, or where the defendant satisfied...the whole or any part of the subject matter of the suit.*** The presence of one of the ingredients adjusts the suit to the extent of the agreement, compromise or satisfaction and the plaintiff will be entitled to apply for judgment accordingly. I will borrow from Paragraph 388 ***Halsbury's Laws of England, Volume 37, Fourth Edition*** which provides for several forms and methods of settlement or compromise. Agreement or “consent” of the parties is important in the first category of adjustment of a suit in rule 25 but satisfaction does not require agreement or consent of both parties. In the latter category of satisfaction, conduct of or acts by the Defendant in relation to the suit is what is important. That distinction should be drawn in order to understand the complete scheme of things in rule 25. The Defendants herein have laid almost sole emphasis to agreement or consent of the parties as the only factors which would entitle the plaintiff to judgment under rule 25. Satisfaction does not require agreement or consent of the parties as mostly it involves unilateral acts done by defendant or the conduct of the defendant. See Black's Law Dictionary Ninth Edition, on the definition of satisfaction that it is;

“1. The giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligation. Satisfaction differs from performance because it is always something given as a substitute for or equivalent of something else, while performance is the identical thing promised to be done. 2. The fulfilment of an obligation; especially, the payment in full of a debt.

[5] Satisfaction closely resembles performance as both presume intention to carry out an obligation. But the distinction made out in the above text is clear for all purpose the distinction between satisfaction and performance is of legal as well as practical significance. There should be no obfuscation of the two concepts because the former relates to some done while the latter on something agreed, which are in two different worlds. That said the Adjustment of the suit by agreement or consent of parties or by satisfaction need not be wholly, it may be in part settlement of the claim and judgment is entered to the extent only of the agreement or consent or satisfaction offered in the suit. In light of the foregoing rendition of the court, the correct question to ask is whether the actions by the 3rd and 4th defendants by releasing the

lorry is in satisfaction of prayer e of the Amended Plaintiff and, therefore, amounts to adjustment of the suit to that extent? The Defendants herein asked themselves the wrong question and then proceeded to overly and wrongly concentrate on the absence of agreement or consent of parties. No doubt, there was no agreement or consent of the parties in respect of the acts by the defendants in returning the lorry in question. But, it is the return of the lorry which the Plaintiff claims amounted to satisfaction of prayers d and e of the Amended Plaintiff, hence adjustment of the suit to that extent. The court should answer; do those acts amount to satisfaction or is this a case of the suit having been overtaken by events? The 3rd and 4th defendants carried out their duties as receivers and sold the trucks and trailers belonging to the 1st plaintiff except KAZ 516M Mercedes Benz (Actros) and Trailer registration number ZC 4425. The suit herein was not filed to compel the 3rd and 4th defendants to complete the receivership or to carry out their duties as receivers. The suit is a challenge to the appointment of the 3rd and 4th defendants as receivers and managers over the assets of the 1st plaintiff. Prayer d seeks to restrain the 3rd and 4th defendants from continuing the receivership and management. In the circumstances of the case, therefore, the actions by the 3rd and 4th Defendants to complete the receivership would not be in satisfaction of the suit in the sense of rule 25. They simply performed their role as receivers and managers. I agree the major prayers on which the application before the court is premised have been overtaken by events particularly those which sought to restrain the 3rd and 4th Defendants from selling certain assets but which have since been sold. What about the return of KAZ 516M Mercedes Benz (Actros) and Trailer registration number ZC 4425? Prayer e seeks to restrain the sale of a number of motor vehicles, among them, KAZ 516M Mercedes Benz Actros and Trailer registration number ZC 4425.

[5] In the case of **Javan Lewa Mute Vs Shiva enterprises Limited Mombasa HCCC No. 242 of 1995**, M. Odero, J. made a subtle observation which I am content to adopt here when the learned judge stated that;

“... At the same time the court must exercise great care not to impose an adjustment/compromise upon an unwilling party and not to descend into the arena of the dispute.”

The return of KAZ 516M Mercedes Benz (Actros) and Trailer registration number ZC 4425 to the 1st Plaintiff was voluntarily done by the 3rd and 4th Defendants. The 1st plaintiff claimed the return of the said lorry in the Amended Plaintiff. Therefore, the return of KAZ 516M Mercedes Benz (Actros) and Trailer registration number ZC 4425 is in part satisfaction of the suit. Accordingly, there would be adjustment of the suit in prayer e of the amended plaintiff, for, the return of the said lorry. The other prayers in the amended plaintiff have been overtaken by events and parties should take such steps in law to bring this litigation to an end somehow. But the Amended plaintiff as well as the initial plaintiff were not supported by a verifying affidavit as required by Order 4 Rule 1 (2) and (4) of the Civil Procedure Rules. A verifying affidavit is not a technical requirement; it is a fundamental requirement in law. A verifying affidavit serves useful purposes and that is why it is made under oath; the plaintiff verifies the correctness of the averments in the plaintiff especially that there is no previous pending suit between the parties over the same subject matter. Appropriate averment was made in that behalf, but in light of this omission I will not enter judgment for the Plaintiff to the extent of the adjustment or order for costs. The Plaintiff should, however, find a way of bringing the entire suit to closure given the status of the case. I wish also to state that, there is no necessity of an order so that the plaintiffs can engage in any business once the Receivership ends. The Receivers should be able to communicate that as by law required. It is so ordered.

Dated, signed and delivered in court at Nairobi this 10th day of November, 2014

F. GIKONYO

JUDGE

Ruling delivered in the presence of:

1. M/S NG'ANIA for the Plaintiffs

2. OYAGI for the Defendants

F. GIKONYO

JUDGE