

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW
DIVISION
PETITION NO. 1 OF 2019

**JOSEPH KARANJA KANYI T/A KANYI
& COMPANY ADVOCATES.....PETITIONER**

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT
MOMBASA CHIEF MAGISTRATE’S COURT.....3RD RESPONDENT

AND

- 1. KIKAMBALA DEVELOPMENT COMPANY LIMITED**
- 2. JANE NJERI KARANJA**
- 3. FREDRICK OTIENO OYUGI**
- 4. MAURICE MILIMU AMAHW A**
- 5. EPHRAIM MAINA RWINGO**
- 6. SELINE CONSULTANTS LIMITED**
- 7. JOAN ZAWADI KAREMA**
- 8. RENSON THOYA JUMA**
- 9. HARRY JOHN PAUL ARIGI**
- 10. JOY KAVUTSI MUDAVADI alias JOY K. ASIEMA**
- 11. KENYA PORTS AUTHORITY RETIREMENT
BENEFITS SCHEME.....INTERESTED PARTIES**

RULING

1. The application before court is a motion by the 2nd respondent seeking the following orders:

(a) This Application be certified as urgent, service thereof dispensed with, and heard ex parte in the first instance.

(b) The taxation of the Petitioner's Party & Party Bill of Costs dated 9th April 2024 be stayed pending the hearing of this Application inter partes.

(c) The taxation of the Petitioner's Party & Party Bill of Costs dated 9th April 2024 be stayed pending the hearing and determination of this Application.

(d) This Honourable Court be pleased to declare that the order of payment of costs herein has been compromised by a consent entered into by the Petitioner and the 2nd Respondent in ACEC No. 16 of 2017 on 9th April 2024.

(e) Consequently, this Honourable Court be pleased to declare that the Bill of Costs as presented is in bad faith, vexatious and an abuse of the Court process.

(f) This Honourable Court be pleased to strike out the Petitioner's Party & Party Bill of Costs dated 9th April 2024.

(g) This Honourable Court be pleased to make any such order and/or orders as it may deem just and appropriate in the circumstances.”

2. The applicant has also asked for an order on costs. The application is expressed to be brought under articles 25, 50 and 159 of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act, cap. 21; and, Order 2, rule 15 (d) and (e) of the Civil Procedure Rules.

3. The application is based upon the affidavit of Mulki Kumar who has introduced himself as the 2nd respondent's senior investigation officer duly appointed in that capacity under section 23 of the Anti-Corruption and Economic Crimes Act, 2003. He states that he is also one of the investigators in the inquiry relating to the subject matter of these proceedings, and that he is an advocate of this Honourable Court.
4. According to Kumar, sometime in July 2015, the 2nd Respondent received a complaint that the trustees of the Kenya Ports Authority Staff Retirement Benefits Scheme, the 11th Interested Party in these proceedings, had illegally, fraudulently or corruptly entered into an agreement with Kikambala Development Company Ltd for sale of the Scheme's 100 acres of land.
5. The 2nd Respondent launched investigations into the allegations and subsequently established, *inter alia*, that the 1st Interested Party corruptly and illegally entered into an agreement dated 18 December 2014 with the 11th interested party for sale of 100 acres of land identified as Plot Nos. 5025/1191, 5025/1192, 5025/1194, 5025/1195, 5025/1196, 5025/1197, 5025/1200, 5025/1201, 5025/1202, 5025/ 1203, 5025/1204, 5025/1205,5025/1206, 5025/1224, 5025/1225, 5025/1226, 5025/1227, 5025/1228, 5025/1229 and 5025/1230 situated in the south of Takaungu, Kilifi County at a total purchase price of Kenya Shillings Seven Hundred Million (Kshs. 700,000,000.00).

6. The agreement was executed by the 2nd and 5th Interested Parties on behalf of the 1st Interested Party while the 3rd, 7th and 9th Interested Parties executed the same on behalf of the 11th Interested Party.
7. Pursuant to the said agreement for sale, the 11th Interested Party paid Kenya Shillings Seventy Million (Kshs. 70,000,000.00), being 10 percent of the purchase price, to the 1st Interested Party through its Advocates, Joseph Karanja Kanyi T/A Kanyi & Co., Advocates.
8. Sometime in 2018, the 1st Respondent preferred charges against the Petitioner and the Interested Parties in Mombasa Chief Magistrate's Court Anti-Corruption and Economic Crimes Case No. 13 of 2018. The charges were founded on the sale agreement dated 18 December 2014 executed between the 1st Interested Party and the 11th Interested Party.
9. On or about the 9 January 2019, the Petitioner instituted this Petition to challenge the decision of the 1st respondent to charge him and the Interested Parties in the Mombasa Chief Magistrate's Criminal Case No. 13 of 2018. According to the petitioner, the issues raised in criminal case no. 13 of 2018 were the same issues raised in another Anti-Corruption Case No. 16 of 2017 filed in Nairobi.
10. In a Judgement delivered by Ogola, J. on 12 May 2020, the petitioner's petition was allowed with costs.

11. The suits which arose as a result of the investigations into the sale and purchase of the 100 acres of land have been listed in Kumar's affidavit as follows:

“a. Constitutional Petition No. 24 of 2015 which was filed by elected trustees (Harry John Paul Arigi, Joan Zawadi Karma, Renson Juma Thoya) against the Board, the MD and GM, Legal Services and sought to determine the issue whether the Respondents have any legal right to question decision of the scheme's trustees to spend over Kshs. 700 million in the purchase of 100 acre of land, at the price of Kshs. 7 million per acre.

c. Nairobi ACEC No. 16 of 2017 for recovery of Kshs. 70 million.

d. Mombasa CMCR No. 13 of 2018 a criminal case against the Petitioner herein and others.

e. The Petition herein filed in 2019 challenging the criminal case.

f. Nairobi COACA/281 of 2020 which appeal sought to challenge the decision of the judge delivered on 08.07.2020 declining to transfer ACEC 16 of 2017 to Mombasa.

g. Court of Appeal Civil Application N. 59 of 2020 being the DPP's application for enlargement of time to file the Notice of

Appeal against the judgment of the High Court at Mombasa, (E Ogola, J) delivered on May 12, 2020.

h. Court of Appeal Civil Application N. 183 of 2020 being an application seeking to have the Notice of Appeal dated 20th May 2020 and lodged on May 22, 2020 against the judgment of the High Court at Mombasa, (E Ogola, J) delivered on May 12, 2020 be struck out.

1. Court of Appeal Civil Application N. 184 of 2020 being an application seeking to have the Notice of Appeal dated 20th May 2020 and lodged on May 22, 2020 against the judgment of the High Court at Mombasa, (E Ogola, J) delivered on May 12, 2020 be struck out.

J. Mombasa ELC No. E128 of 2022 filed by Kikambala Development Company Ltd seeking specific performance and damages for breach of contract.”

12. After the filing of ACEC No.16 of 2017, a consent was recorded which led to the opening of an escrow account number 1251972454 held at Kenya Commercial Bank, Milimani branch, in Nairobi, in the name of the Petitioner and Culent Simiyu for the 2nd respondent where a total of Kenya Shillings Seventy Million (Kshs. 70,000,000.00) was deposited.

13. Thereafter, the parties in ACEC No. 16 of 2017 entered into negotiations with a view to settle the suit and all related pending proceedings through alternative dispute resolution mechanisms. The said negotiations were commenced by a letter from the Petitioner dated 5 February 2024 addressed to the 2nd Respondent.

14. In his letter, the petitioner acknowledged that the overarching dispute could be resolved through alternative dispute resolutions mechanisms. He observed that the stumbling block towards this direction was the existence of the criminal charges against various individuals in the Mombasa Chief Magistrates Court Case No. 13 of 2018 but which had been successfully challenged in this petition. Efforts to file an appeal against the decision of this court allowing the petitioner's petition had also failed in the Court of Appeal.

15. According to the petitioner, the criminal aspect of the dispute had been laid to rest save for his costs which he thought would jeopardise negotiations for amicable settlement of the matter if he was to insist on pursuing them. The petitioner, therefore, suggested that all the pending cases be withdrawn with no order as to costs.

16. That notwithstanding, the petitioner suggested that the interests accrued on money in the escrow account be released to him to offset the legal costs he had incurred in defending all related criminal and civil suits.

17. According to Kumar, the petitioner's letter of 5 February 2024 formed the basis of the negotiations between or among parties in Nairobi ACEC No. 16 of 2017 and the subsequent settlement. The 2nd respondent engaged in the negotiations in good faith, based on the offer made by the Petitioner and in the public interest, considering the amounts sought to be recovered belonged to pensioners at Kenya Ports Authority.
18. Following the anticipated negotiations, the 2nd Respondent and the Petitioner, tentatively agreed on the proposed terms of settlement including the release of fifty percent (50%) of the accrued interest "*to offset the legal costs so far incurred*" by the Petitioner in related cases.
19. The 2nd Respondent then sought the concurrence of the Kenya Ports Authority Retirement Benefits Scheme, on the proposed terms of settlement vide a letter dated 12 March, 2024.
20. The 11th Interested Party held a virtual meeting with the 2nd Respondent on the 28 March, 2024 and discussed the reasons behind the 2nd Respondent's accommodation of the Petitioner in releasing fifty percent (50%) of the accrued interest. The 2nd Respondent impressed upon the 11th Interested Party that the releasing fifty percent (50%) of the accrued interest was based on the principle of "give and take" and consideration for the Petitioner's undertaking to refrain from pursuing any claim against any party.

21. The 11th Interested Party, having considered the reasons advanced by the 2nd Respondent, agreed to the terms of the proposed terms of settlement vide an email dated 3 April, 2024. The 2nd Respondent, agreed to the release of the fifty percent (50%) of the accrued interest on the understanding that the said amount would *"offset the legal costs so far incurred"* by the Petitioner including the costs in this petition and that the Petitioner would not pursue any other claim, howsoever, arising from the investigation.

22. The consent dated 9 April 2024, was adopted as the judgement of the Court on 9 May 2024 but the decree was issued on 20 May 2024. In the meantime, the 2nd Respondent and the Petitioner, among other parties, also signed and filed in Court a consent dated 16 April, 2024 and signed by the parties on 19 April 2024 in Mombasa ELC No. 128 of 2020 agreeing to withdraw the case with no order as to costs despite the matter having been heard and was only pending delivery of the judgment.

23. On 21 May 2024, the Decree issued by Hon. Justice Prof. Dr. Nixon Sifuna on 8 May 2024 in ACEC No. 16 of 2017 was served upon Kenya Commercial Bank with instructions to close A/C No. 1251972454 which had Kshs. 88,585,982.25. The Bank was further instructed to disburse Kshs. 79,292,871.25 to the 2nd Respondent and Kshs. 9,292,871.25 to the Petitioner.

24. On the 30 May 2024, the 2nd Respondent issued the Petitioner with receipt Nos. RCP011019 and RCPOI 1020 for the sum of Kenya Shillings Seventy Nine Million Two Hundred and Ninety Two Thousand Eight Hundred and Eighteen Shillings and Fifty Three Cents (Kshs. 79,292,818.53) in full and final settlement of ACEC No. 16 of 2017.
25. By a payment voucher dated 12 June 2024, the 2nd Respondent paid the 11th Interested Party the sum of Kenya Shillings Seventy Nine Million Two Hundred and Ninety Two Thousand Eight Hundred and Seventy One Shillings and Twenty Five Cents (Kshs. 79,292,871.25) being a refund of monies recovered by the 2nd Respondent on behalf of the 11th Interested Party.
26. The 11th Interested Party vide a letter dated 28th June, 2024 acknowledged receipt of Kshs. 79,292,871.25 and commended the 2nd Respondent for its diligent efforts and commitment to justice. However, despite having expressly undertaken in their letter dated 5 February 2024 not to pursue costs, the Petitioner has filed the impugned Party & Party Bill of Costs.
27. According to the applicant, the petitioner intends to steal a match on the 2nd Respondent and his bill of costs is a violation of the spirit of the negotiations and the resultant consent that led to the withdrawal of related cases and restraint on the part of the Petitioner from making any other claim against the 2nd Respondent or any other party in this matter.

28. It is also the petitioner's position, the Petitioner's Party & Party Bill of Costs is in bad faith and is an abuse of the Court process since, under Clause 5 of the decree issued by Hon. Justice Prof. Dr. N. Sifuna on 8 May 2024, the Petitioner undertook to withdraw and discontinue all suits and appeals filed in Court whether directly or indirectly arising out of the subject matter yet he raised a Bill of Costs, dated 9 May, 2024, the same day the consent was signed by the Parties in ACEC No. 16 of 2017. Despite the Petitioner having filed the Bill of 16 April, 2024, he did not serve it on the 2nd Respondent.

29. The 2nd Respondent was not made aware of the Bill of Costs during the negotiations and during the time of signing and registering the consent in Court. Had the Petitioner served the Bill of Costs at the time of the negotiations, the 2nd Respondent would not have signed the consent. As a matter of fact, the Petitioner served the 2nd Respondent with the Bill of Costs only after a court order to that effect.

30. According to the applicant, the Petitioner's Party and Party Bill of Costs dated 9 April 2024 is further an abuse of the Court process as the legal costs incurred by the Petitioner in defending the present proceedings were factored into the decree issued by Hon. Justice Prof. DR. N. Sifuna in ACEC No. 16 of 2017 under Clause 3. Moreover, the sum outlined in Clause 3 of the decree was released to the Petitioner by Kenya Commercial Bank on or about the 29 May 2024 in full and final

settlement of the legal costs incurred by the Petitioner in defending all related civil and criminal matters including the present proceedings.

31. Kumar has sworn that the 2nd Respondent shall be gravely prejudiced in the event that the Petitioner's Party and Party Bill of Costs dated 9 April 2024 proceeds to be taxed as it will be tantamount to unjust enrichment of the Petitioner whose legal costs for the present proceedings have already been settled as per Clause 3 of the decree issued on 8 May 2024 in ACEC No. 16 of 2017.

32. The petitioner filed a replying affidavit opposing the application. He has admitted that he entered into a consent with the applicant that culminated in settlement of the following cases:

(i) Nairobi ACEC No. COACA/E281 of 2020.

(ii) Mombasa Constitutional Petition No. 24 of 2015.

(iii) Mombasa High Court Civil Suit No. 64 of 2015.

(i) Milimani Anti-Corruption & Economic Crimes Division Case No. 16 of 2017.

(j) Mombasa ELC No.128 of 2020.

33. However, the negotiations did not at any point touch the costs which had already been awarded to him in this suit way back on 12 May, 2020. In any event, owing to the fact that the petitioner was represented by an

advocate of this Honourable court in the instant Petition, any negotiations touching on the costs which had been awarded earlier, would not have materialized without first involving his advocate. Thus, the consent did not include costs awarded in this petition.

34. According to the petitioner, the decree in Milimani ACEC No. 16 of 2017 does not have retrospective effect on the decree of this court of 12 May, 2020. The Bill of Costs is filed in the very Petition wherein costs were awarded and cannot be construed as being a fresh suit in terms of the Consent Order in Milimani ACEC No. 16 of 2020.

35. The 1st to 5th interested parties also opposed the application and their counsel, Fredrick Adhoch Esq. swore a replying affidavit in that behalf. The order awarding costs was specific that the interested parties would bear their own costs and, therefore, the interested parties' response to the application is of little relevance.

36. It is apparent that, central to the dispute between the parties is the consent order entered in this Honourable Court's Anti-Corruption & Economic Crimes Court Case No. 16 of 2017(Nairobi) and owing to its centrality to the application at hand, it is necessary that I reproduce the entire consent here:

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MAURICE MILIMU AMAHWA.....11TH DEFENDANT

DECREE

THIS MATTER COMING UP for directions on 8th of May, 2024 before Justice Prof. (Dr.) Nixon Sifuna for a the (sic) Consent dated 8th April, 2024 and presented in Court on 19th April 2024 AND UPON HEARING Ms. Lunyolo, Counsel for the Plaintiff, (sic) Mr.Achoka, Counsel for the 1st -5th Defendants, Mr.Omwenga, Counsel for the 6th & 11th Defendants and Mrs. Okune and Counsel for the 7th -10th

Defendants, IT IS HEREBY DECREED BY CONSENT: -

- 1. THAT the 1st Defendant, Kanyi J & Company Advocates pays to the Plaintiff, Ethics and Anti-Corruption Commission Kenya Shillings Seventy Million (Kshs. 70,000,000) being settlement of the Plaintiffs claim against the Defendants in the suit.***
- 2. THAT payment of the above said sum of Kenya Shillings Seventy Million (Kshs. 70,000,000) be effected by way of bank transfer from escrow A/c No.1251972454 held at Kenya Commercial Bank Milimani branch, jointly by Joseph Karanja***

Kanyi and Culent Lunyolo to EACC Asset Recovery Account as detailed below within Thirty (30) days of adoption of this consent.

NAME: ETHICS AND ANTI-CORRUPTION COMMISSION

ASSET RECOVERY ACCOUNT NO. : 1103256548

BANK : KENYA COMMERCIAL BANK

BRANCH: MILIMANI

3. THAT in full and final settlement of this matter, the interests at 06.05.2024 and any other interest accrued thereafter in escrow A/c No.1251972454 held at Kenya Commercial Bank Milimani Branch be shared at the ratio of 50:50 between the plaintiff and the 1st Defendant within Thirty (30) days of adoption of this consent.

NAME : KANYI J. & COMPANY ADVOCATES

BANK : KCB BANK (K) LIMITED

TREASURY SQUARE

MOMBASA

A/CNO : 1107605784

BRANCH CODE: 102

SORT CODE : KCBKLNEX

4. THAT upon compliance with order numbers 1, 2 and 3 above, the Orders issued on 19th December 2017 in Miscellaneous Application No.659 of 2016-EACC =VRS= Kanyi J & Co. Advocates and 2 others prohibiting dealings with the parcel of land known as CR.No.19534 Subdivision Number 5043 (Original Number 405/4) Section 1 Mainland North (owned by the 4th Defendant) be and is hereby vacated.

5. THAT parties hereto shall withdraw and discontinue all suits and appeals filed in court, with no orders as to costs, whether directly or indirectly arising out of the subject matter herein and the parties hereto undertake to refrain from instituting any suit directly or indirectly relating to the subject matter herein.

6. THAT this suit be and is hereby marked as settled against the defendants with no orders as to costs.

7. THAT this order be served upon KCB Bank Milimani Branch and the Registrar of Lands for compliance.

Given under my hand and the seal of the court this 8th day of May, 2024

Issued at Nairobi this 20th day of May, 2024

DEPUTY REGISTRAR

HIGH COURT OF KENYA

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION”

37. The proposals firmed up in this consent are contained in a letter dated 5 February 2024 from Kanyi, J and Company Advocates to the Ethics & Anti-corruption Commission. Being the background against which the consent order was entered, it is also necessary that I reproduce the entire letter here; it reads as follows:

“5.2.202

4

“without prejudice”

Ethics & Anti-Corruption Commission.

Integrity Centre,

NAIROBI

ATT: MS. MURUGI

RE: MILIMNANI ACEC NO. 16 OF 2017

ETHICS & ANTI-CORRUPTION COMMISSION=VERSUS+

JOSEPH KARANJA KANYI T/A KANYI J. & COMPANY

ADVOCATES

The above matter and the tele-conversation with our Mr. Achoka refers.

Needles to regurgitate (sic) the history of this matter and in MSA ELC NO. 128 OF 2020; Kikambala Development Company Limited -VS= Kenya Ports Authority Retirement Benefits Scheme (2012) is Kshs.70 Million paid to M/s. Kanyi J. & Company, Advocates as stakeholders.

That three entities to wit, EACC, KPARBS [2012] and Kanyi J. & Company Advocates, have since laid their respective claim over the said sum in these two suits is not in doubt.

That the said Kshs. 70 Million is deposited in a joint interest earning account between the Plaintiff and ourselves pursuant to a consent order of this court is equally not contested.

Of major importance is the fact that the issues involved in this dispute might indeed occupy the entire judicial hierarchy of this Republic for the longest time with each party anchoring its respective arguments on existing legislations is equally not in contest.

With the foregoing reality, the Plaintiff and ourselves have indeed on various occasions come to an agreement that this matter is better settled amicably through Alternative Dispute Resolutions (ADR). See your letter dated 7th November, 2018, (REF: M/581/1/17 PO-ea) together with ours of 22nd May, 2019 and 30th October, 2019 which you were copied.

The stumbling block was, then the existence of the criminal charges against various individuals in Msa CMCR No. 13 of 2018, which prosecution was successfully challenged MSA ACEC Petition No. 1 of 2019 and the Appeals therefrom in the Court of Appeal - Civil Applications No. 59, 183, 184 of 2020 all which have since been determined in our favour. In a nutshell, the Criminal limb of the dispute is settled save for our costs and/or suits for malicious prosecution (all of which we think pursuing will jeopardize further the steps so far made on the negotiation table).

All circumstances considered, at paragraph 8 of our letter of 22nd May, 2019; we stated thus:-

".....the time it will take for all related cases to be finally and conclusively resolved; the loss on the value of that money that the complainant is incurring.....I suggest and propose therefore that the amount of money in the escrow account (Kshs. 70 Million) be released either to EACC or KPARBS 2012"

We still hold the same position in the interest of having the dispute resolved amicably. In fact, in Msa ELC No. 128 of 2022, the Plaintiff therein have sought for:-

a) Forfeiture of the said Kshs. 70 Million due to the breach of the agreement of 18th December, 2014 by the Purchaser therein.

b) Interest on such sum, is legally payable to the innocent party in an agreement and NOT to the party who is guilty of defaulting its part of the bargain.

The fact that the judge in the said suit has once held that filing this suit (ACEC No. 16 of 2017) before the rights of parties in the Agreement of 18th December, 2014 is determined is kin (sic) to putting the cart ahead of the horse; and considering the fact that Msa ELC No. 128 of 2020 is at the very tail of hearing;

Considering the fact that the best way of resolving the dispute herein with finality, we therefore are of the view that the following thematic areas are the best road map towards achieving a win-win solution to the same.

1. All pending civil cases to wit:-

- ▶ Nairobi ACEC No. COACA/E281 OF 2020.*
- ▶ Constitutional Petition No. 24 of 2015.*
- ▶ Mombasa High Court Civil Suit No. 64 of 2015.*
- ▶ Milimani Anti-Corruption & Economic Crimes Division Case No. 16 of 2017 be withdrawn with no orders as to costs with the firm of Kanyi J. & company, Advocates undertaking to facilitate the withdrawals.*
- ▶ Msa ELC No. E128 of 2022*

2. The interests accrued on monies in the escrow account be released to M/s. Kanyi J. & Company, Advocates to offset the legal costs so far incurred in defending all related criminal and civil suits.

3. We undertake not to pursue any claim be it for malicious prosecution, for any other tort against any party.

4. We undertake to engage Co-defendants on the foregoing.

Kindly but urgently let us have your comments.

Yours faithfully

KANYI J. & COMPANY

Signed

J.K. KANYI

38. Having been written without prejudice to the petitioner's right to defend himself against the plaintiff's claim, this letter would have been of no legal consequence. However, the Ethics & Anti-Corruption Commission, more or less, accepted the terms of settlement of the dispute revolving around the recovery of public property.

39. I come to this conclusion because by its letter dated 8 April 2024, the Ethics & Anti-Corruption Commission wrote to the Deputy Registrar of this Honourable Court, Anti-Corruption & Economic Crimes Division, forwarding what, in effect was a concrete agreement reached in terms

proposed by the petitioner for adoption as the order of the court. The letter was signed by the plaintiff and all the defendants, and as is apparent on the face of the decree, it was eventually adopted as the judgment of the court.

40. The letter is, thus, relevant in interpreting the consent order. At the very minimum it gives the background to the consent and also sheds some light on what the parties to the consent intended to achieve.

41. A consent is as good as a contract and, in the event of a dispute, the legal tools for interpretation of a contract would ordinarily be available for interpretation of a consent.

42. In the English case of **Prenn v Simmonds** - [1971] 3 All ER 237 Dr Simmonds's (the respondent's) claim in an action was that, under the terms of an agreement under seal dated 6 July 1960, he was entitled to acquire from Mr Prenn, a 4 per cent interest in the ordinary capital of a company controlled by Mr Prenn called Radio & Television Trust Ltd ('RTT') for a consideration of £6,000. This interest was worth, at the date of the trial, about £200,000. Mr Prenn disputed the claim on the ground that a necessary condition set by the agreement had not been satisfied because less than £300,000 profits available for dividend on the ordinary stock of RTT over the relevant period had been earned. Dr Simmonds, on the other hand, maintained that the condition had been fulfilled.

43. The dispute before court related not to the figures, which were agreed, but to the definition of profits of RTT available for dividend on its ordinary stock. If this meant the separate profits of RTT alone, the amount over the period fell just short of the target, by less than £10,000. But if it meant the consolidated profits of the group consisting of RTT and subsidiaries, the amount was largely exceeded.
44. The House of Lords held that the question was simply one of construction of the agreement and stated that:

“In order for the agreement of 6 July 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in River Wear Comrs v Adamson ((1877) 2 A Cas 743 at 763, [1874-80] All ER Rep 1 at 11) provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. More-over, at any rate since 1859 (Macdonald

v Longbottom) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.”

45. Lord Wilberforce held further that:

“Although in construing a written agreement the court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively, the 'aim' of the transaction.”

46. I would consider the petitioner’s letter of 5 February 2024 to be the sort of evidence that constitutes the factual background known to the parties before the consent was entered into. As a matter of fact, it was not only the ‘genesis’ of the consent but also introduced the goal or, in the language of Lord Wilberforce, the “aim” of the negotiations that culminated into the consent.

47. Of particular interest in that letter are paragraphs 2 and 3 where the petitioner wrote as follows:

“2. The interests accrued on monies in the escrow account be released to M/s. Kanyi J. & Company, Advocates to offset the legal costs so far incurred in defending all related criminal and civil suits.

3. We undertake not to pursue any claim be it for malicious prosecution, for any other tort against any party.”

48. ***“All related suits”*** would include the instant petition in which the petitioner had been awarded costs. The petition is a ***“related”*** suit because it was related to the Commission’s pursuit of the recovery of the public property and conviction of persons it believed had committed offences under the Anti-Corruption & Economic Crimes Act or other relevant laws, in the course of the transaction disposing of the property. At least, there is no suggestion in the clause that the petition was excluded from ***“all related suits”***. At the time of making his proposal, the petition had been concluded and the order on costs had already been made and, therefore, if, despite the consent, the petitioner was intent on pursuing his costs, he would have clearly stated so. But he could not because, taking the petitioner at his own word, he was to be paid interest accrued on the monies in the escrow account:

“to offset the legal costs so far incurred in defending all related criminal and civil suits”.

49. The petitioner was indeed paid, and he has not denied that he received the sum of Kshs. 9,292,871.25 to cover his legal costs in defending all related criminal and civil suits. *“All related criminal and civil suits”* would, of course, include the instant petition. To suggest, as the petitioner has done, that the consent in ACEC No. 16 of 2017 has no reference to his costs in this petition or that the consent has no retrospective effect is, with a lot of respect to the petitioner, being dishonest.

50. As matter of fact, the petitioner’s argument does not stand to logic because, as at the time the consent was recorded, the order for costs had not only been made in this petition but also, the petitioner had filed his bill of costs. The bill is dated 9 April 2024 and is recorded to have been filed on 16 April 2024. It follows that *“the legal costs so far incurred”* would include the costs that had been incurred in the petitioner’s prosecution of his petition, and which he sought to be taxed in the pending bill of costs.

51. The petitioner’s undertaking that he will not *“pursue any claim”* would include the claim for costs. A claim, in these circumstances, would not necessarily be restricted to a substantive suit but his pursuit for costs as well.

52. For the reasons I have given, I hereby allow the applicant's application and strike out the petitioner's bill of costs dated 9 April 2024. Parties will bear their respective costs. Orders accordingly.

Signed, dated and delivered on 13 March 2026

Ngaah Jairus
JUDGE