



REPUBLIC OF KENYA



**Sinohydro Corporation Limited v Chacha (Suing as the Administrator
of the Estate of Chacha Wagumbo - Deceased) (Civil Appeal
34 of 2021) [2024] KEHC 2921 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 34 OF 2021
RPV WENDOH, J
MARCH 19, 2024**

BETWEEN

SINOHYDRO CORPORATION LIMITED APPELLANT

AND

**MARGARET CHACHA (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF CHACHA WAGUMBO - DECEASED) RESPONDENT**

RULING

1. The application for determination before this court is dated 15/3/2023. Sinohydro Corporation Limited (the appellant) seeks the following orders:-
 - a. Spent;
 - b. This court be pleased to adopt the draft consent order as an order of this court;
 - c. That this court be pleased to compromise the appeal as per the consent order;
 - d. That costs of this applicant be provided for.
2. The application is based on the grounds appearing on its face and is supported by the affidavit of Eric O. Ojuro, Counsel for the appellant, sworn on 15/3/2023.
3. Counsel deposed that this appeal precipitated from the proceedings filed in CMCC No. 38 of 2020; that judgement was entered in favour of the respondent in the sum of Kshs. 4,978,000/= together with costs of Kshs. 226, 195/=; that the appellant gave Counsel instructions to negotiate a settlement proposal of Kshs. 1,600,000/= to compromise the appeal; that Counsel wrote to Counsel for the respondent a letter dated 11/5/2022 but the terms thereof were rejected by Counsel for the respondent in a letter dated 20/5/2022.



4. Counsel further deposed that the respondent's Counsel in his letter dated 20/5/2022 gave a counteroffer of Kshs. 2,500,000/=; that by a letter dated 24/5/2022, Counsel for the appellant communicated to Counsel for the respondent instructions that the appellant had agreed to settle the suit at Kshs. 2,600,000/= all inclusive; that Counsel prepared a consent letter dated 13/3/2023 and duly signed the same but upon presenting the consent letter, the respondent rejected it. Counsel asks this court to compromise the appeal as per the consent order.
5. The application was opposed. The respondent's Counsel filed a replying affidavit dated 13/4/2023 in which he deposed that judgement was entered in favour of the respondent; that as a condition for stay pending appeal, the costs and decretal sum were deposited in a joint interest earning account in the names of both advocates; that the appellant failed to prosecute the appeal until on 17/6/2022 when this appeal came up for a notice to show cause; that the appellant was granted leave to file a supplementary record of appeal.
6. Counsel for the respondent deposed that he got an offer for settlement for Kshs. 1,600,000/= which proposal was rejected by his client; that his client gave a counteroffer through a letter dated 20/5/2022; that the appeal was set down for hearing on 25/1/2023; that the court directed that the matter be heard by way of written submissions; that the appellant was given 21 days to file written submissions and the respondent was to file within 14 days after service; that the matter came up for further directions on 30/3/2023 but the appellant had not complied by then.
7. Further, it was stated that this appeal had been slated for further directions on 25/5/2023 but the appellant brought this present application in an attempt to force the respondent to enter into a consent to favour the appellant at the expense of the respondent and defeat the enjoyment of the respondent's judgement after 2 years.
8. The appellant filed a further affidavit dated 22/5/2023. It was deposed that the replying affidavit dated 13/4/2023 does not respond to the issues raised in the application; that the respondent has not raised issue with their letter dated 20/5/2022 as the same was communicated to the appellant for the purposes of settling the matter by way of compromising the appeal.
9. The parties were directed to file written submissions. The appellant filed in court its written submissions dated 28/6/2023 on 6/7/2023. It was submitted that this application is premised on Order 25 Rule 5 (1) of the *Civil Procedure Rules*; that this application seeks for the appeal to be compromised on the basis of the consent order dated 13/3/2023; that the consent order emanated from the instructions to settle the appeal by Kshs. 2,600,000/=; that the letter dated 20/5/2022 did not bear the without prejudice clause which the appellant intends to rely on as evidence as it was held in *Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd* (1986) eKLR.
10. It was submitted that the letter dated 20/5/2022 gave efficacy to a contract which compromised the appeal as there was an implied term of the contract; that the letter dated 20/5/2022 is binding on the respondent. Reliance was placed in the case of *Njibia Muoka Rashid Co. Ltd v Cianda Holdings Limited* HCCC No. 307 of 2013 where the court cited the case of *Choitram v Nazarai* (1984) eKLR.
11. I have considered the application, the response thereto and the submissions of the appellant. The issue for consideration is whether this court can compromise the appeal based on the terms of the letter dated 20/5/2022.



12. It has not been denied that there were correspondences between Counsel for the appellant and the respondent with a view to settle the appeal. The appellant contended that this application is brought under the provisions of Order 25 Rule 5 (1) and (2) of the Civil Procedure Rules which provides: -

“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 satisfies 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.”

13. I discern from the above provision that for a court to enter judgement under Order 25 Rule 5(1) and (2), there must be an agreement or a compromise.

14. The Black Law Dictionary defines the terms agreement and compromise as follows:-

“An agreement is as a mutual understanding between two or more persons about their relative rights and duties regarding past or future performance, a manifestation of mutual assent by two or more persons.

A compromise means an agreement between two or more persons to settle matters in dispute between them.”

15. The letter dated 11/5/2022 from the appellant was a proposal to settle the appeal at Kshs. 1,600,000/= plus costs. The respondent’s Counsel rejected the proposal and instead asked for Kshs. 2,500,000/= and the assessed costs of Kshs. 226,194/=. The appellant’s Counsel gave a counter offer for Kshs. 2,600,000/= and sent a consent to be signed by the Counsel for the respondent. Counsel for the respondent did not indicate whether the proposal for Kshs. 2,600,000/= was agreeable. I do note that the correspondences between Counsel were on a without prejudice basis.

Choitram v Nazari (1984) eKLR the Court of Appeal held: -

“For the purpose of order XII rule 6 (now Order 25 Rule 5 (1) and (2), admissions can be express or implied either on the pleadings or otherwise, eg in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis.”

16. From the correspondences between Counsel with a view to settle this appeal, there was an intention to settle the matter. The respondent in his replying affidavit did not tell this court if his client was amenable to the proposal in the letter of 13/3/2023 to settle the appeal. Counsel was silent on this.
17. Taking cue from the findings in the case of Choitram (*supra*), I am of the view that the letter dated 20/5/2022 being counter -offer, there must have been an unequivocal acceptance for the same to be deemed as a contract hence binding on the parties.



18. I, accordingly find that the Application lacks merit and is hereby dismissed with costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF MARCH, 2024.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

No appearance for the Applicant.

No appearance for the Respondent.

Emma & Phelix Court Assistants.

