IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL REVISION NO. 14 OF 2020

(Originating from Civil Case No. 16 of 2016 of the Resident Magistrates' Court of Bukoba)

LUCAS YAKOBO...APPLICANT

VERSUS

HAMDAN SELEMAN..RESPONDENT

RULING

26th June & 22nd July 2022

Kilekamajenga, J.

The applicant filed the instant application by way of chamber summons supported with an affidavit seeking the following orders:

1. *That, this Honourable Court be pleased to call for and examine the records and proceedings of the Resident Magistrates' Court of Bukoba at Bukoba in Civil Case No. 16 with the view to satisfy itself as to the correctness, legality and proprietary (sic), of the deed of settlement purported to be recorded on 20th Day of December 2016.*
2. *That, this Honourable Court be pleased to issue an order revising the deed of settlement issued on 20th December 2016.*
3. *Cost of this application be provided for.*
4. *Any other/further relief(s) that the tribunal (sic) may deem fit.*

The background of the case is however apposite. The respondent contracted the applicant to become an agent of fishing and supplying fish. Due to that contract,

the respondent supplied the applicant with money, machines, boats, nets, fuel and other relevant thing to enable the applicant undertake the contract.

However, the applicant did not honour the terms of the contract as agreed. In 2016, the respondent sued the applicant in the Resident Magistrates' Court of Bukoba vide Civil Case No. 16 of 2016. He claimed for Tshs. 38,246,695 as losses incurred after failing to honour the contract. Also, the respondent claimed for Tshs. 15,000,000/= as expected income from business from the time of breach of contract to the date of filing the case. When the case came for hearing on 20th December 2016, both parties were marked present. The applicant was represented by the learned advocate Sifael and the respondent was represented by the learned advocate, Mr. Frank John. On that date, the counsel for the respondent informed the court that, the applicant agreed to settle the matter by paying Tshs. 1,000,000/= each month for a period of thirty eight (38) months. The applicant also agreed to pay Tshs. 2,000,000/= as costs incurred by the respondent in hiring an advocate. The submission by the counsel for the respondent was supported by the counsel for the applicant, Mr. Sifael. Thereafter, the case was marked settled based on the conditions stated by the counsel for the respondent and supported by the counsel for the applicant.

Still, the applicant did not honour the payment of Tshs. 1,000,000/= each month. In 2018, the respondent filed execution proceedings vide Misc. Civil Application No. 15 of 2018. In that application, the applicant was represented by

the learned advocate, Mr. Fidelis Cassian. The application was finally determined in absence of the applicant and his counsel as they failed to attend to the case. Maje Maje Auction Mart was appointed to execute the decree of the trial court.

Thereafter, the applicant filed Civil Revision No. 06 of 2018 before this Court seeking extension of time of which he was accordingly granted allowing him to file the instant application. During the hearing of this application, the learned advocate, Mr. Geofrey Mwachae appeared for the applicant whereas the learned advocate, Mr. Frank Karoli appeared for the respondent. In his oral submission, the counsel for the applicant argued that, under **Order XXIII, Rule 3 of the Civil Procedure Code, Cap. 33 RE 2019,** the deed of settlement must be written and consented by the parties. In this case, there is no evidence to show that the settlement between the parties was recorded. He cemented his argument with the case of **Isaka Lupimo v. Hamdan Seleman, Civil Revision No.5 of 2018**, HC at Bukoba (unreported).

In response, the counsel for the respondent argued that, on 20th December 2016, the applicant and respondent were present hence the agreement was reached in their presence. He argued further that, the law does not specify the form in which the agreement must be recorded hence there is no illegality in the proceedings. He prayed for the application to be dismissed with costs.

When rejoining, the counsel for the applicant insisted that, the deed of settlement ought to be written and signed by the parties and that his client did not consent on such an agreement. He urged the court to allow the application.

In this application, the major issue calling for determination is whether the trial court was right in recording the oral submission from the counsels for the parties without requiring the written deed of settlement to be filed in court. Before venturing the discussion on this issue, I should set it clear that, upon visiting the original records of the Resident Magistrates' Court of Bukoba, on 20th December 2016, when the case came for hearing, on the coram, the magistrate recorded 'present' on both the applicant and respondent. Thereafter, the counsel for the respondent commenced the submission on what the parties agreed. It is therefore not clear whether the parties were present. The anomaly has prompted concern on whether the applicant consented on the agreement. To answer this question, the guidance of the law is therefore pertinent. As argued by the counsel for the applicant, **Order XXIII of the Civil Procedure Code,** requires any agreement or compromise on the case to be recorded. For clarity and understanding, I wish to reproduce the respective order thus:

> *'3. Where it is proved to the satisfaction of the court 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 order such agreement, compromise or satisfaction to be recorded,*** *and shall*

pass a decree in accordance therewith so far as it relates to the suit.' (Emphasis added).

In my view, based on the above provision of the law, where such an agreement or compromise is reached, it is mandatory for the court to order such an agreement, compromise or satisfaction to be recorded. In other words, the court does not record the agreement by itself to avoid being part of the agreement or compromise. To put it clear, the agreement must be recorded and signed by the parties and be filed in court for the court to adopt it and pass a decree based on such an agreement. The position in India, which is similar to our law has specifically added the requirement of putting the agreement or compromise in writing. **Solil Paul and Anupam Srivastava, *Mulla the Code of Civil Procedure,* 16th Edition, at page 3200** gives the rationale of putting the agreement in writing thus:

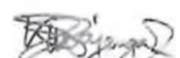
> *'The whole object of the amendment of rule 3 of Order 23 by adding the words 'in writing and signed by the parties' it to prevent false and frivolous pleas that a suit has been adjusted wholly or in part by any lawful agreement or compromise, with a view to protract or delay the proceedings in the suit. When the parties enter into a compromise during the hearing of a suit or appeal, the court must insist upon the parties to reduce the terms of compromise into writing and to sign the same.'*

It seems, India encountered some issues in connection with agreements which were not reduced into writing hence the requirement of writing was emphasised through an amendment. In our case, to avoid the complication of parties denying

the agreement in future, as in this case, it is always prudent to task the parties to reduce their agreement in writing. In the case at hand, the trial court which only recorded oral submission of the advocates for the parties and did not bother to hear the parties who are the direct beneficiaries of the agreement acted hastily and without diligence. As a result, the applicant has come to challenge the agreement which he, so far, did not put his finger to authenticate it. To give him a benefit of doubt, he cannot be tied on an agreement he never consented. I find merit in the application and hereby allow it. I hereby set aside the order and decree thereof that marked the case settled based on the deed of settlement that the applicant did not consent. The parties, if they wish, may proceed with the hearing of their case. This being an oldest case, the trial court should give it a priority for trial. No order as to costs. It is so ordered.

Dated at Bukoba this 22nd Day of July 2022.

Ntemi N. Kilekamajenga.
JUDGE
22/07/2022



Court:

Ruling delivered this 22nd July 2022 in the presence of Edna Samwel who brought information on the counsel for the respondent, Mr. Frank John. Both the applicant and respondent were absent. Right of appeal explained.

Ntemi N. Kilekamajenga.
JUDGE
22/07/2022