

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 215 OF 2002

TANZANIA PORTLAND CEMENT  
COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

CALVIN ITAELI MAIMU.....DEFENDANT/APPLICANT

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R U L I N G

KALEGEYA, J:

The Applicant prays for an order setting aside an order made by this court on 3/7/2003. The Applicant prosecuted the application on his own while Mr. Mbuya, Advocate, represented the Respondent.

In order to appreciate the gist of the application and the arguments, let me reproduce the proceedings of 3/7/2003 in full. They are as follows:

*"Date: 3/7/2003  
Coram: L.B. Kalegeya, J.  
For the Plaintiff: Mr. Wolfgang Spengler  
For the Defendant: Mr. Mbamba  
CC: Kanyochole, S.H.*

*Mr. Mbamba:  
We were to record a settlement but I don't know what has become of Mr. Mbuya. We have however discussed with the Plaintiff's principal officer and struck an agreement which we wish to record.*

*Mr. Wolfgang:  
That is correct.*

Sgd:  
L.B. Kalegeya  
Judge

Mr. Mbamba:  
*Parties are agreed that the Defendant shall pay the Plaintiff shs.45 million in full settlement of the claim, inclusive of the principal sum, interest and costs. The same to be paid in equal six monthly instalments commencing on 31/7/2003 and then on every 30<sup>th</sup> day of the month following.*

Mr. Wolfgang:  
*That is correct.*

Sgd:  
L.B. Kalegeya, J.

Order:  
*The suit is hereby marked settled on terms as follows:*

1. *The Defendant shall pay the Plaintiff shs.45 million inclusive of the principal sum, interest and costs.*
2. *The said sum to be paid in six equal monthly instalments of shs.7,500,000/= each. The first instalment shall become due on 31/7/2003 and the remainder shall fall due on every 30<sup>th</sup> day of each succeeding month.*

Sgd:  
L.B. Kalegeya  
Judge  
3/7/2003"

The Applicant is challenging the said order. Again, for clarity let his supporting affidavit paint the picture:-

- “2. *That the main suit was fixed for mediation on 3<sup>rd</sup> July 2003*
3. *That on 3<sup>rd</sup> July 2003 during the said Mediation the presiding Judge asked the parties to go to the conference room for purposes of trying to settle the case.*

4. *That after consultations between my advocate Mr. Mbamba and a representative of the Respondent Mr. Wolfgang Spengler, the said representative gave an offer for settlement that I pay the sum of Shillings 45,000,000/= as the sum due in six equal monthly instalments.*
5. *That in response to the Respondent's said offer I told my advocate Mr. Mbamba that I would not be able to liquidate the said sum in 6 months as suggested but rather in eighteen (18) months which is manageable to me.*
6. *My said advocate refused to accept what I had given as a counterproposal of liquidating the sum due in eighteen months stating that the Respondents would not accept it. The said advocate also threatened me and told me that he was not ready to come to court again in relation to this case so he could not help me any more. My advocate further asserted that he would go to tell the presiding Judge that I had refused to pay the debt due and that he would withdraw from the conduct of the case and thereafter I would have to be imprisoned for the debt due.*
7. *That after this we went back to the Presiding Judge's chamber and my said advocate informed the court that I had agreed that the debt due is Shilling45,000,000/= and I had agreed to liquidate the same in six equal monthly instalments as the Respondent had suggested.*
8. *That this Honourable Court issued an order on 3<sup>rd</sup> July 2003 that the case had been settled on the terms that I was to pay the sum of Shillings 45,000,000/= six monthly instalments.*
9. *That I was not ready and willing to liquidate the said sum of Shillings 45,000,000/= in six monthly instalments as my advocate had informed the court but rather in eighteen months but had to accept the Respondent's terms after I was forced and threatened by the said advocate.*

10. *That the time I thought had since I had employed the services of my said advocate I was not allowed to speak and inform court that I needed more time than the six months.*
11. *That if I had not been forced by my said advocate I would not have accepted the condition to liquidate the sum of Shillings 45,000,000/= in six equal monthly instalments.*
12. *That if I was aware that I could speak at the time I would have notified the court that I would not be able to liquidate the said sum due in six equal monthly instalments but rather in eighteen monthly instalments.*
13. *That what seemed to have been a settlement made on 3<sup>rd</sup> July 2003 was entered into after I had been threatened and forced by my said advocate and as such was not made on my own free will.*
14. *That if this application is not granted I shall suffer irreparable loss in that I will be bound by an agreement of which I was forced into."*

Against the above however we have Mr. Wolfgang's Counter affidavit which in part states:

- "5. *That with regard to paragraph 5 of the affidavit I state that the payment of the sum of Shs.45,000,000/= in six equal instalments was not an offer for settlement from me but was a consensus reached by the parties after considering the proposal contained in Advocate Mbuya's letter Ref. FSM/MA/TPCC/03/143 dated the 19<sup>th</sup> June, 2003 addressed to Mbamba & Co. Advocates and two other options based on a longer repayment period at a higher interest rate or a shorter repayment period with a lower interest rate and the parties, therefore, struck a balance whereby the amount payable was reduced from Shs.58,232,538/= to Shs.45,000,000/= but the number of monthly instalments remained six. A copy of the letter is annexed hereto and marked "TPCC-2."*

- 6. ....
- 7. *That I deny the contents of paragraph 7 repeat paragraphs 5 and 6 above the state that at no time during the course of the discussions and negotiations did the Advocate for the Defendant/Applicant refuse to accept any proposal or counter proposal from the Defendant/Applicant or in any way threaten or force the Defendant/Applicant”,*

And, Mr. Mbamba’s affidavit is in the following wording:

- “4. *That the said **Calvin Itael Maimu** on 2<sup>nd</sup> July, 2003 visited my chambers for discussion of the matter whereby I showed to him a proposal by the Plaintiff (Annexure “A”).*
- 5. *That the said **Calvin Itael Maimu** agreed to the proposal and consequently, we arranged for a settlement of the matter on such terms the following day i.e. 3<sup>rd</sup> July, 2003.*
- 6. *That on the said 3<sup>rd</sup> July, 2003 when we appeared for mediation his Lordship invited us for mediation and allowed, us that is to say, the said **Calvin Itael Maimu, myself, Mr. Wolfgang Spengler** and a clerk from the chambers of **Mr. Mbuya Advocate** for the Plaintiff, to discuss the matter in the conference room and if ready, inform the court.*
- 7. *That in the said conference room we four personalities named above discussed the matter whereby the Plaintiff dropped his claim to 45 million and proposed six months instalments schedule of payment. The said **Calvin Itael Maimu** conceded to the proposal.*
- 8. *That after such consensus, we four personalities entered judge’s chamber and recorded settlement as agreed, that is to say, the Defendant should now pay **45-ml.** to the Plaintiff in six months instalments and no order as to costs and his Lordship made an order to that effect and read the order to us and we all said his Lordship had correctly recorded what we had agreed upon in the conference room.*

9. *That his Lordship commended us for the settlement and when we were waiting for a typed order the said **Calvin Itael Maimu** came with a second – thought and asked me “if we could adjourn mediation to another date” whereby I educated him that once the judge had already made an order following our own proposal, it was not allowable to go back and seek for adjournment. He appeared to have understood.*
10. *That I didn't see said **Calvin Itael Maimu** to my chambers until I was shown an Affidavit with serious allegations, namely that I threatened and forced him to concede to the Plaintiff's claim which fact is not true.”*

Arguments and submissions were fronted along the lines reflected in the affidavits, hence there is no necessity of rephrasing them as it will just be a useless repetition.

Having carefully considered the affidavit evidence, submissions and what transpired on 3/7/2003, I am satisfied that the application has no merits.

Yes, the Applicant is a layman but before me, this energetic youngman, displayed no element of lack of comprehension let alone timidity. If indeed there existed any intimidation during negotiations he would not have simply kept silent when the order was being made let alone when his Advocate was making the submissions as per court record reproduced above. In any case, from his own affidavit, he is not disputing indebtedness. His only quarrel lies with the number of instalments. In the circumstances, one would ask, why at all should his advocate act against his interests. It is hard to come across any reason, not even a possible one. I am satisfied that his change of mind was a result of second reflection which

