



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC CIVIL APP NO 95 OF 2016

MWANIKI GITAU & CO ADVOCATE.....APPLICANT

VERSUS

ESTHER WAMBUI NJOROGE.....RESPONDENT

KAMBUSU OLE PAKINE.....OBJECTOR

RULING (2)

1. In its Notice of Motion application dated 19th December 2019 and filed on 20th December 2019, the Respondent herein sought an order that the matter herein be marked as compromised and/or fully settled with no order as to costs. She swore the Affidavit in support of the application herein on 19th December 2019.
2. She contended that on 20th December 2018, judgment on taxed amount of Kshs 362,052/= was entered against her in favour of the Applicant herein and that after subsequent discussions held between Mr Mwaniki Advocate and her advocates, the Applicant accepted a sum of Kshs 200,000/= in full and final settlement of the decree, which she pointed out had never been forwarded to her. She added that she paid the Applicant the said sum of Kshs 200,000/= and consequently, the suit was therefore fully settled.
3. She stated that the Applicant had refused to execute a consent on the settlement of the matter but instead instructed M/S Dancy Auctioneers to attach her goods to recover an alleged balance in the sum of Kshs 188,813.91. It was her contention that the purported execution was illegal, malicious, in bad faith and merely meant to vex and annoy her and thus urged this court to allow her application as prayed.
4. In opposition to the said application, on 15th July 2020, Joseph Mwaniki Gitau swore a Replying Affidavit on behalf of the Applicant herein.
5. His contention was that the judgment that was entered in his favour against the Respondent herein in the sum of Kshs 362,052/= had not been set aside, reviewed and/or vacated. He pointed out that his law firm proceeded with execution proceedings after she failed to honour the proposals she had made to settle the said decretal sum.
6. He raised a preliminary objection on the production of the letter dated 21st December 2018 and sought the directions of the court on the same as he stated that the same was written on a "without prejudice basis." It was his averment that the production of privileged communication was prejudicial, scandalous and oppressive. He also stated that the letter was altered by hand by the recipient and was not countersigned.
7. He also pointed out that the Applicant had several untaxed bills against the Respondent herein, which were outstanding, as at 21st December 2018 when she made a proposal for settlement. It was his contention that in Misc 333 of 2013, the Applicant acknowledged a sum of Kshs 60,000/= in respect of that file and she had failed to demonstrate on which accounts the payments were made.
8. He was emphatic that there was no mutuality of minds to compromise the case and thus urged this court to dismiss the present application.
9. In her Supplementary Affidavit sworn on 15th September 2020, the Respondent stated that the letter of 21st December 2018 stopped being privileged after she paid the sum of Kshs 200,000/=. She denied ever having altered the letter and averred that the alteration was done by the Applicant as it was a typographical error that should have read 5th January 2019 as the date of payment.
10. She added that the Applicant never raised the issue of the said sum not having been paid on time. She was categorical that the sum of

Kshs 200,000/= was in respect of the file herein as the Applicant did not have any other judgments against her and it was thus illogical and unreasonable for it to expect her to specify the account in respect of which the amount was made.

11. She reiterated the aforesaid facts in her Written Submissions to argue that she had settled the compromised amount fully and the matter should then be marked as settled.

12. On the other hand, the Applicant submitted that the alteration of the letter to read as 5th January 2019 as opposed to 2nd January 2019 amounted to making a false document contrary to Section 347 of the Penal Code Cap 63 (Laws of Kenya). It added that without prejudice communication apart from being privileged had been altered to give it a new meaning and force a settlement. It challenged her to adduce the original document for scrutiny by the court.

13. It relied on the cases of Orion East Africa Ltd vs Eco-Bank Limited & Another [2015] eKLR where the Court of Appeal in citing with approval the case of Dalip Singh vs State of U.P and Others 2010 (2) Section 114 the Supreme Court of India had stated that:-

“It is now established that a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.”

14. It also placed reliance on the case of City Finance Bank Ltd vs Caroline Wanjibia [2008] eKLR where it was held that where a judgment is clear as to the terms, anything which is done subsequently by the parties and is not in consonant with the judgment is invalid.

15. It added that the authorities cited hereinabove were in respect of a suit pending pursuant to Order 25 Rule 5 (sic), which was not the case herein.

16. Notably, the central key issue in the present application is whether or not the Respondent herein could rely on the letter of 21st December 2018 to argue that the present proceedings had been compromised based on two (2) grounds. The first ground is that the letter was on a without prejudice basis and the second ground is that the said letter had been altered.

17. The court deemed it prudent to address the question as to whether the said letter was admissible in evidence herein. In the penultimate paragraph of the said letter, the Applicant stated as follows:-

“ Entirely on account and without prejudice to our right to enforce the payment of the entire amount we shall accept payment of Kshs 100,000/= on or before the 2nd day of January , 2019 in full and final settlement of this matter.

In the event that payment is not honored the offer will automatically expire and the entire amount as per the Decree will become payable and enforceable by execution.”

18. A document ceases to be privileged when a court is called upon to interrogate it to establish whether or not the parties have fulfilled the terms therein. However, if parties are in further discussions with a view of arriving at agreed terms, then the court ought not to interrogate it. Rather, it ought to shut its eyes to it as discussions on without prejudice basis are intended to give parties the freedom of negotiating a matter outside the knowledge of the courts.

19. In the case Re Daintrey ex Holt [1893] 2 QB 116 that Nzioki wa Makau J relied upon in the case of Millcent Wambui v Nairobi Botanica Gardening Limited [2013] eKLR, it was held that the protection afforded by the phrase ‘without prejudice’ is limited to negotiations for compromise. The Court per Vaughan Williams J stated at page 119:

‘In our opinion the rule which excludes documents marked “without prejudice” has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms.

20. In the said case of Millcent Wambui v Nairobi Botanica Gardening Limited (Supra) , Nzioki wa Makau J expressed himself as follows:-

In the case of Walker v Wilsher (1889) 23 QBD 335 which was cited by the Hon. Justice Shields in the case of Lochab Transport Ltd v. Kenya Arab Orient Insurance Ltd [1986]eKLR It was held that the “without prejudice” material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement.

21. This is a position that this court fully associates itself with. Indeed, as the Respondent submitted that she accepted the offer and made the payment, this court was called upon to enquire as to the terms of the compromise.

22. It was indicated that a sum of Kshs 100,000/= would be paid by 2nd January 2019. A perusal of the statement that was furnished by the Respondent showed that on 5th January 2019, she made the following payments:-

Transaction Number Amount

NA50Z38GZ1 Kshs 50,000/=

NA59YVW9A3 Kshs 50,000/=

Kshs 100,000/=

23. It was clear that the Respondent paid the sum of Kshs 100,000/= as was required in the letter dated 21st December 2018. Indeed, the Applicant did not deny this fact. The question that next arose was whether the said amount was paid on the date stipulated therein so as to bind the Applicant to the terms of the negotiations.

24. The date by when the said amount was to be paid was hotly contested. The Respondent averred that the Applicant amended a typographical error in the said letter by writing by hand the date of 5th January 2019. This was vehemently denied by the Applicant which asserted that the Respondent altered the letter so as to force the agreement.

25. Based on these contrasting positions, this court could not for a fact determine which party was not being truthful as it was one party's word against the other. As the date on when the sum of Kshs 100,000/= was to be paid was not one that this could ascertain, it found itself in difficulties to conclude that the parties were *ad idem* as far as settlement of the matter herein was concerned.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Motion application dated 19th December 2019 and filed on 20th December 2019 was not merited and the same is hereby dismissed. Due to the court's uncertainty of the veracity of both parties' respective cases, it is hereby directed that costs of the application will be in the cause.

27. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of November 2020

J. KAMAU

JUDGE